Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

MALLOTT & PETERSON and
INDUSTRIAL INDEMNITY COMPANY,

Petitioners,

v.

BEATRICE STADTMILLER,

Respondent.

**On Petition For Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

ROGER A. LEVY
LAUGHLIN FALBO LEVY & MORESI, LLP
Two Embarcadero Center
Fifth Floor
San Francisco, California 94111-3823
(415) 781-6676
Counsel of Record for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

94 pp

QUESTIONS PRESENTED

I. Is an attorney at law a "representative" as that term is used in 33 U.S.C. § 933(g)?

II. Is a client bound by the acts of her attorney, when the attorney enters into and fully performs a settlement with a third-party without her express authorization?

PARTIES TO THE ACTION

Plaintiff/Respondent:

Beatrice Stadtmiller, widow of Delbert Stadtmiller

Defendants/Petitioners:

Mallott & Peterson, Employer and Industrial Indemnity Company, insurer

RULE 29(6) CORPORATE DISCLOSURE STATEMENT

Mallott & Peterson is no longer in existence.

Industrial Indemnity Company is a major insurance underwriter of employer risks in west coast markets. There are no subsidiary companies. Its parent company is Industrial Indemnity Holdings, Inc., whose parent is Talegen Holdings, Inc., whose parent is Xerox Corporation.

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OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals sought to be reviewed was filed October 24, 1996. Appendix A. It affirmed an October 31, 1994 Decision and Order of the Benefits Review Board of the United States Department of Labor. Appendix B. The Board affirmed an October 18, 1993 Decision and Order of Administrative Law Judge Paul A. Mapes. Appendix C.

All three of these decisions hold that an attorney is not a representative and that a client is not bound by the acts of her attorney. All three mention, but do not decide whether a settlement occurred.

STATEMENT OF JURISDICTION

Jurisdiction to grant certiorari is pursuant to 28 U.S.C. § 1254(1). There has been no Petition for Rehearing by the Appeals Court of its October 24, 1996 Opinion.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statue involved in this case is 33 U.S.C. § 933, part of the Longshore & Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq.* 33 U.S.C. § 933 is reproduced in Appendix D.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

This case presents issues of statutory construction, of fundamental principles of agency law, and of what constitutes a settlement pursuant to 33 U.S.C. § 933(g). This case asks if an employer's statutory lien and credit rights may lawfully be frustrated through the sequestration of settlement funds by a claimant's attorney in his trust account.

Delbert Stadtmiller was employed by Mallott & Peterson through 1946. He was exposed to asbestos during that employment, and died of lung cancer December 21, 1990. He was survived by his widow, Beatrice Stadtmiller (hereafter "Stadtmiller".)

Claims were made for benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 et seq. In addition, a complaint seeking civil damages was filed against the manufacturers and suppliers of asbestos products. Payment of LHWCA benefits was commenced by Petitioners voluntarily. Thereafter, without giving notice to nor seeking approval of Petitioners, Stadtmiller's attorney entered into an agreement with civil defendant, Waldron-Duffy (Waldron); money was exchanged for a dismissal with prejudice, which was duly filed in the Superior Court.

Claimant Stadtmiller was initially represented by the law offices of Kazan, McClain, Edises & Simon of Oakland, California both in her civil and LHWCA claims. She subsequently substituted the law offices of Cartwright,

Slobodin, et al. of San Francisco, California to represent her in her civil claim.

On or prior to August 4, 1992, attorneys in the Cartwright firm negotiated a settlement of Stadtmiller's civil claim against Waldron with Waldron's attorney, Roderic Jones.[1] On September 8, 1992, after transmittal of the agreed upon sum to the civil attorney, Harry Wartnick of the Cartwright firm,[2] Attorney Wartnick executed and filed a Request for Dismissal with Prejudice as agreed to by attorneys Wartnick and Jones. That document was entered by the California Superior Court September 11, 1992.[3] No notice of these transactions was given to Petitioners and no approval was sought or obtained from Petitioners at any time prior to, or even following, the transaction.

Thereafter, Petitioners learned of the civil settlement and filed a motion March 5, 1993, seeking summary decision and relief from further liability pursuant to 33 U.S.C. § 933(g). On March 19, 1993 Attorney Wartnick signed a declaration that he had negotiated the settlement, received the funds, placed them in the firm's client trust account, but that he had not informed his client nor distributed any of the money to her.[4]

Under § 933(g) of the LHWCA, in order to protect the lien and credit rights of maritime employers and their

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[1] Mr. Jones' letter of August 4, 1992, Defendants' Trial Exhibits (hereafter DTE) at pg. 106.

[2] DTE pp. 99, 104.

[3] DTE pg. 1.

[4] DTE pg. 2.

insurers who may be obligated to pay workers' compensation benefits, a claimant forfeits rights to further compensation benefits if she or her representative settles with a third party civil defendant without employer approval.

B. PROCEDURAL HISTORY

The primary issue in all three lower court decisions was whether 33 U.S.C. § 933(g) barred Stadtmiller from receiving further benefits under the Longshore and Harbor Workers' Compensation Act because of third party settlements without employer approval. Administrative Law Judge Mapes did not enforce § 933(g) because he concluded (a) that an attorney was not a representative and (b) a client was not bound by the acts of her attorney. The trial court did not decide if settlement had occurred. The Board and the Ninth Circuit affirmed on these two questions, and also agreed with the trial court that they need not reach the question whether settlement had occurred.

The issues now presented to this Court are whether the Appeals Court erred in (1) construing the term "representative" as used in 33 U.S.C. § 933(g) to exclude attorneys, and (2) concluding that a client is not bound by the acts of her attorneys.

If certiorari is granted and the Appeals Court is reversed, the case should be remanded to the trial level for determination if settlement has indeed occurred.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT A WRIT TO RESOLVE CONFLICTS BETWEEN ITS OWN HOLDINGS AND THE NINTH CIRCUITS' RULING IN THIS CASE.

This Court holds that a client is bound by the acts of his or her attorney. But the Appeals Court holds that respondent is not bound by the acts of his or her attorneys. This Court recognizes that an attorney is the "representative" of a party. But the Appeals Court holds that an attorney is not a "representative." In both of these questions, the courts below have departed so far from the expected and normal course of judicial proceedings as to call for this Court's exercise of its power of supervision.

II. THIS COURT SHOULD GRANT A WRIT TO ADDRESS AN IMPORTANT PUBLIC POLICY ISSUE.

Congress and this Court have repeatedly held, beyond peradventure, that a claimant under the LHWCA has two obligations to the employer with regard to third-party recoveries. (1) Notice must be given of any third-party recovery whether by settlement or by judgment. (2) The employer's approval must be obtained prior to any settlement. Respondent, whether by design or inadvertence, has constructed a scheme to avoid both of these obligations through the expedient of an attorney negotiated settlement with the third-party and sequestration of the recovery in the attorney's trust account. Such conduct obliterates protections afforded to employers under 33 U.S.C. § 933, allows an impermissible shifting of liability

from the third-party to the employer, and ultimately results in a double recovery for the claimant. But rather than condemning such conduct, the courts below have given it judicial *imprimatur*. That result goes far beyond allowing Stadtmiller to escape the statutory sanctions Congress has imposed for such conduct. The decisions below provide a blueprint for avoiding statutory obligations in a multitude of pending and future cases. The actual abuse in this case and the potential abuse in pending and future cases warrants this Court's attention.

ARGUMENT

A.

LEGISLATIVE AND JUDICIAL HISTORY

In 1917 the Supreme Court held that state workers' compensation laws could not constitutionally regulate maritime injuries occurring upon the navigable waters of the United States. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). This left a large group of employees not eligible for traditional seamen's benefits without any workers' compensation remedy. The result was the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901, et seq., enacted by Congress in 1927 to fill that void.[5] The LHWCA in its original form was limited to injuries occurring upon navigable waters. § 903 (1927). It provided that liability of the employer under the LHWCA was to be exclusive and in place of all other

[5] Unless otherwise stated, all further reference to code sections are to 33 U.S.C. § 901 et seq.

liability for damages at law or in admiralty. § 905 (1927). The employee had the option of seeking benefits under the LHWCA or pursuing a third party tort feasor, if any such existed. § 933(a) (1927). If a third party recovery was inadequate, the employee could obtain the difference between the third party recovery and the benefits provided under the LHWCA from the employer, after exhausting credit for the third party recovery obtained. § 933(f) (1927). But that deficiency was available only if the employer approved the third party settlement. § 933(g) (1927).

The LHWCA lien and credit rights were challenged almost immediately with the contention they did not extend to insurers. This Court quickly decided,

> That plan would be destroyed if the insurance company were denied the right of subrogation; for the consequences would be to permit the double recovery . . . which the statute is careful to avoid, with resulting increase in the cost of insurance which the statute requires.[6]

Two decades later a severe breach developed in this "plan". A third party ship vicariously liable for negligence of a stevedore employer, which in turn was vicariously liable for negligence of the injured worker's fellow employees, was found entitled to indemnity from the employer, on a warranty theory.[7]

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[6] *Aetna Life Insurance v. Moses*, 287 U.S. 530, 542 (1933).

[7] *Ryan Stevedoring v. Pan-Atlantic Steamship Company*, 350 U.S. 124 (1956).

Following *Ryan*, Congress amended the LHWCA with Pub. Law 86-171 (1959), codified as § 933(i), making the right to compensation or benefits under the LHWCA the "exclusive remedy to an employee when he is injured . . . by the negligence or wrong of any other person or persons in the same employ" except for remedies against third parties. This new provision had the dual purpose of protecting negligent fellow employees directly and protecting employers from vicarious liability, because "rights and liabilities arising within the 'employee family' will be settled within the framework of the Longshoremen's and Harbor Workers' Compensation Act."[8] This Court explained that the purpose of § 933 was that it "protects the employer."[9]

But employees and third parties continued in their efforts to open the door to the imposition of civil as well as workers' compensation liability on LHWCA employers. Maritime employers were held liable to indemnify third parties even absent negligence, on an unseaworthiness theory.[10] It was time for labor and management to compromise their interests through the legislative process.

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[8] SENATE COMM. ON LABOR AND PUBLIC WELFARE, HARBOR WORKERS-COMPENSATION-THIRD PARTY LIABILITY ACT OF 1959, S. Rep. No. 428, 1959 U.S. Code Cong. & Admin. News 2134, 2135.

[9] *Banks v. Chicago Grain Trimmers*, 390 U.S. 459, 467 (1968).

[10] *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964); *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 731 (1967).

In 1972, Congress made sweeping changes to the LHWCA.[11] Coverage under the LHWCA was expanded to include large new groups of workers ashore, and the benefit structure was dramatically improved. But in exchange, Congress closed and locked the door to employer liability for damages.

In order to achieve uniformity and consistency for maritime employees and employers, these 1972 Amendments thrust coverage under the Act ashore for the first time, covering longshoremen and other harbor workers whether they were injured seaward or landward of the tide line.[12] The benefit structure was substantially increased and a mechanism for annual adjustments was created.[13] In order to further protect, and to reaffirm the earlier employer protections, the exclusivity provisions of § 905 were strengthened.[14] And to still further protect employer lien and credit rights, § 933(g) was amended to clarify the form of the employer approval required for a third party settlement.[15]

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[11] Pub. Law 92-576, the Longshoremen and Harbor Workers' Compensation Act Amendments of 1972.

[12] §§ 902(3) and 903 as amended in 1972.

[13] 33 U.S.C. § 906 as amended in 1972.

[14] Newly enacted § 905(b), eliminated the unseaworthiness cause of action, eliminated actions by longshoremen, ship builders, or ship repairmen against vessels based on negligence of fellow employees, and provided that any "agreements or warranties to the contrary shall be void."

[15] Prior to 1972, § 933(g) only required written approval by the employer, and did not specify the form. After 1972, such approval had to be obtained "prior to such compromise on a form provided by the Secretary and filed in the office of the

Just as Congress in 1959 eliminated an employee's right to seek damages for the negligence of fellow employees, in 1972 it eliminated an employee's right to damages for unseaworthiness that fellow employees failed to prevent. Consistent with this policy, maritime employers could not be held liable either directly or indirectly for damages to injured employees.

Consistent with this strong legislative history, this Court continued to protect employer lien and credit rights through individual decisions holding that a third party may not offset its liability for damages caused by alleged comparative employer fault.[16] This Court went so far as to hold that an employers lien and credit rights were "inviolable".[17] Thus not only were maritime employers immunized from liability beyond that provided under the LHWCA, but their credit rights were also protected at every turn.

In 1984 Congress again amended the LHWCA, once more strengthening employer lien and credit rights.[18] In order to avoid double recovery, express provision for

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deputy commissioner . . . within thirty days after such compromise is made." 33 U.S.C. § 933(g) (1972).

[16] *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979).

[17] *Bloomer v. Liberty Mutual*, 445 U.S. 74 (1980). *Bloomer* rejected an attempt to hold the employer liable for part of the employee's attorney fees in securing third party recovery. The Court reasoned that would indirectly impose upon the employer liability for civil damages, which the LHWCA prohibits.

[18] Pub. Law 98-426, the Longshore and Harbor Workers' Compensation Act Amendments of 1984.

credit as to benefits paid under other compensation laws was added.[19] And to correct mischievous administrative construction of the LHWCA, Congress added § 933(g)(2) in 1984. The additional language of § 933(g)(2) provided that forfeiture of rights to workers' compensation benefits otherwise due for failure to obtain employer approval for a settlement applies "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act."[20] Both Congress in 1984, and the Supreme Court in 1992[21] made it clear that maritime employer lien and credit rights were independent of any actual payment under the LHWCA.

In promulgating the 1984 Amendments, Congress stressed how important it considered the lien and credit rights of maritime employers. "The compensation lien on the net [third party] recovery remains inviolable, consistent with *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74 (1980)".[22]

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[19] § 903(e) as enacted 1984.

[20] This language was added to clarify a misinterpretation by the Department of Labor, which had held that forfeiture applied only if payments were actually being made. *O'Leary v. Southeast Stevedore*, 7 Ben.Rev.Baud.Serv.(MB) (1977). *O'Leary* has been overruled. *Estate of Cowart v. Nicklos Drilling*, 505 U.S. 469 (1992).

[21] *Estate of Cowart v. Nicklos Drilling*, 505 U.S. 469 (1992).

[22] JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, 130 Cong. Rec. H9597, 9601.

Despite the clear, unambiguous language of § 933(g)(2) added in 1984, the Benefits Review Board continued with its own prior construction, which had restricted employer lien and credit rights. The Board's construction of the phrase "person entitled to compensation" was different in § 933(g) than elsewhere in the LHWCA. In § 933(g) it based its definition on whether the person was receiving rather than whether the person was entitled to receive compensation.[23] Those two errors by the Board were corrected by this Court in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992).

This presents yet another attempt by LHWCA claimants to design a mechanism to avoid employer lien and credit rights in order to make a double recovery. Distinguishing insurers from employers failed in *Moses*. Shifting attorney fees to the employer failed in *Bloomer*. Allocating credit rights based on self serving attorney assessments failed in *Force*.[24] Characterizing relationships based on allegations rather than on facts failed in *Cowart*. Within months of this Court's *Cowart* decision, Stadtmiller's attorneys embarked upon the scheme presented in the instant case – to utilize the firm trust account and the wall built by the attorney-client privilege and simply proclaim that there has been no settlement. Once again the Board and now the Ninth Circuit have applied § 933 in a manner that frustrates Congress' purpose, by holding that a client is not bound by the acts of her attorney and that an attorney is not a representative.

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[23] *Dorsey v. Cooper Stevedoring*, 18 Ben.Rev.Baud.Serv. 25 (1986).

[24] *Force v. Director, OWCP*, 938 F.2d 981 (9th Cir. 1991).

Again this Court is asked to correct these errors and restore employer rights that Congress intended.

B.

ATTORNEY HARRY WARTNICK IS BEATRICE STADTMILLER'S "REPRESENTATIVE" AS THAT TERM IS USED IN 33 U.S.C. § 933(g)

Section 933(g) of the LHWCA provides that if either "the person entitled to compensation (*or the person's representative*) enters into a settlement" without employer approval, the employer owes no further compensation. The Appeals Court held that "representative" means "legal representative", and is limited to administrators or executors of an estate. The rationale is that § 933(c) contains language regarding "the legal representative of the deceased (hereafter referred to as 'representative')".

There are two ways to construe the parenthetical phrase in § 933(c). The Appeals Court construes the phrase to mean that hereafter the term representative *only means* legal representative. Appellants construe the phrase to mean that hereafter the term representative *also means* legal representative. The question before this Court can be reduced to which of these two constructions is the correct one.

If statutory language is clear, no process of construction is necessary.[25] In construing plain language, it is presumed that every word in a statute has an effective

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[25] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976).

and operative result.[26] As the Court held in *Cowart*, a term must have the same meaning throughout a statute.[27]

The term "representative" appears several places in the LHWCA. It is found in §§ 928(e), 931(a)(1), 931(b)(1), 933(c), 933(g), 933(i), 941(c) and 941(d).

Section 928(e) prohibits a *representative* from collecting a fee without an appropriate administrative or judicial order. Only attorneys at law are allowed fees for representation under the LHWCA. Therefore under that code section the term representative cannot refer to an executor or administrator. It can only refer to an attorney-at-law.

Under §§ 931(a) and (b), sanctions are imposed if "any claimant or *representative* of a claimant" knowingly makes a false statement in order to obtain benefits. An executor or administrator of an estate is not a representative of a claimant. An executor or administrator of an estate *becomes* the claimant. An attorney at law may be a representative of a claimant, whether the claimant be the employee, a dependent, or an executor. It makes no sense to construe the term representative to mean executor or administrator in that context because an executor is in the class of potential claimants. Furthermore, the purpose of § 931 would be frustrated if attorneys were not subject to sanctions for misrepresentations. Section 931 is the

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[26] *United States v. Menasche*, 348 U.S. 528, 538-39 (1942).

[27] 505 U.S. 469. In *Cowart*, the term "person entitled to compensation" appeared in several places in the LHWCA. The Board had construed that term differently in § 933(g) than elsewhere.

LHWCA equivalent of Fed.R.Civ.P. 11. There is no reason to suspect that Congress intended to hold both clients and their attorneys responsible in Rule 11, but only the client responsible in § 931.

The term "legal representative" in § 933(c) should be construed to mean an executor or administrator of an estate. Section 933(c) deals with death claims where there are no dependents, and assigns standing to pursue third party claims.

Turning to § 933(g)(1), the LHWCA refers to a person entitled to compensation "or the person's representative". A deceased person is not entitled to compensation. Rather, compensation in that case would be payable to an estate, to a dependent, or to an heir. But not to the deceased person. Therefore it is not reasonable to conclude that Congress intended to limit the meaning of the term representative in subsection (g)(1) to "legal representatives" in the sense of executors or administrators of estates.

There is another problem with limiting the definition of representative in § 933(g) to legal representatives of estates. Minors and incompetents, though alive, cannot legally settle except through a representative, such as a guardian or an attorney. If § 933(g) requires the action of either a person entitled to compensation or the executor or administrator of a deceased person's estate, then minors and incompetents could never settle with a third party and obtained employer approval, because no person would exist who meets the Appeals Court's limited definition of representative. It is not reasonable to conclude that Congress intended this result especially if it

results in absolutely no protection of the employer's lien and credit rights.

The term *legal representatives* is used also in § 933(i). If Congress intended that the parenthetical phrase in § 933(c) meant that representative *only* meant legal representative, the word "legal" in § 933(i) would be superfluous. This would violate the rule in *Menasche*[28] that every word must have an operative effect.

If there is or may be ambiguity, the reason for the statute should be used as a guide in construing the term.[29] This Court has determined that the purpose of § 933(g) employer approval is to protect the employer.[30] The employer's interest is not protected if an attorney can settle a claim without causing the same sanctions that would result if the client did so.

Attorney Wartnick settled Stadtmiller's claim against Waldron. Petitioners were prejudiced in two ways by the failure to seek their approval. First, no credit could be taken against ongoing compensation payments, because Petitioners did not know of the existence or the amount of settlement funds received. Second, Petitioners were denied the opportunity to evaluate the adequacy of the offer, which was less than half of what the third party itself was willing to pay.[31]

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[28] 348 U.S. 528, 538-39.

[29] *S&E Contractors v. United States*, 406 U.S. 1 (1972).

[30] *Banks v. Chicago Grain Trimmers*, 390 U.S. 459, 467 (1968).

[31] See August 4, 1993 letter from Roderic Jones, which documents settlement authority up to $10,000. DTE p. 106.

A court should consider how a term is used in other statutes.[32] The Ninth Circuit has construed the term "legal representative" as including a party's attorney at law in construing 28 U.S.C. § 2675(e).[33] Fed.R.Civ.Pro. 26(b)(3) also uses the term representative to mean attorney and is totally inconsistent with the construction given that term by the Appeals Court. Rule 1 of the Judicial Council Rules for the Ninth Circuit, dealing with ethical conduct of judges, also uses the term representative in the context of an attorney, in a manner inconsistent with its meaning as an executor of an estate as construed by the Board.

But perhaps most important, a construction that produces an anomalous result is for that very reason a doubtful reading of a statute.[34] Unreasonableness of a construction is grounds for rejecting it in favor of another.[35]

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[32] *Erlenbaugh v. United States*, 409 U.S. 239 (1972).

[33] *Graves v. United States Coast Guard*, 692 F.2d 71, 74 (9th Cir. 1982). The Federal Tort Claims Act requires that a complaint be signed by the plaintiff, his agent, or his legal representative. Regulations require evidence of authority if the claim is signed by an "agent, executor, administrator, parent, guardian, or other representative." 28 U.S.C. § 2675(e). Graves' complaint was signed by his attorney at law, without evidence of authority. The 9th Circuit ruled that the attorney could file without evidence of authority because he was a "legal representative", and thus not specifically listed among those required to present such evidence.

[34] *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 177-78 (1989).

[35] *Sierra Club v. State of Alabama*, 557 F.2d 485 (5th Cir. 1977).

In a long line of cases, some maritime, this Court has held that a statute *"must be read in the light of the mischief to be corrected and the end to be attained."*[36] The "mischief to be corrected" by § 933(g) is conduct that undermines employer lien and credit rights. The "end to be attained" by § 933 is to "protect the employer['s] "rights".[37]

The construction below is wrong because it compounds the mischief rather than corrects it. If attorneys can settle away an employer's rights with impunity, as would be the case if the construction below is allowed to stand, the employer's rights would become a nullity. Attorneys could simply settle as did the attorneys here, deprive employers of both credit and lien rights, and obtain double recovery for their clients. But most significantly, the construction below is wrong because it frustrates the purpose rather than furthering its end.

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[36] *Warner v. Gultra*, 293 U.S. 155, 158 (1934), (emphasis supplied) construing "seaman" in the Merchant Marine Act; quoted with approval in *South Chicago Coal & Dock Co. v. Bassett (Schumann)*, 309 U.S. 251, 259 (1940), construing "crew member" in the LHWCA; *NLRB v. Hearst Publications*, 322 U.S. 111, 124 (1944), construing "employee" in the NLRA; and *McDermott International v. Wilander*, 498 U.S. 337, 349 (1991), referring to this "salutary principal" when construing "seaman" in the Jones Act.

[37] *Banks v. Chicago Grain Trimmers*, 390 U.S. 459 (1968).

C.

BEATRICE STADTMILLER AS CLIENT IS BOUND BY THE ACTS OF HER ATTORNEY, WHEN SUCH ACTS ARE PERFORMED IN THE COURSE OF HIS REPRESENTATION

Even if "representative" in § 933(g) does not include a party's attorney, the result here should be the same. A fundamental rule of agency law is that a principal or client is bound by the acts of her agent or attorney.

The Appeals Court applied its understanding of California law. In doing so it erred in two respects. (1) Federal rather than state law must be applied to the agency issue. (2) Even so, it applied California law incorrectly.

The facts in this case present a question of the construction of a federal statute before a federal tribunal. Authority requires federal rather than state law applies. "Indeed, we have stated that 'it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law' ".[38]

Federal law, which Congress has assumed applies in this matter, states that a client is bound by the acts of his or her attorney.[39] More recently, this Court quoted *Link* with approval, applying it to a "representative", and explained that the practical result of a contrary rule would be confusion and uncertainty.[40]

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[38] *Adams Fruit Company, Inc. v. Barrett*, 494 U.S. 638, 646 (1990), quoting *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 603 (1971).

[39] *Link v. Wabash Railroad*, 370 U.S. 626, 633 (1962).

[40] *Irwin v. Veterans Affairs, et al.*, 498 U.S. 89, 92-93 (1990).

Here, worse than confusion and uncertainty, the contrary rule applied by the Appeals Court results in frustration of Congressional purpose and a blueprint for abuse.

California holds in *Gagnon* that a client is bound by the actions of his or her attorney.[41] But the Appeals Court improperly relies on *Blanton*, which affords a limited exception not applicable in this case.[42] *Blanton* affirmed the earlier California decision in *Gagnon*, but distinguished it on the basis that the conclusive presumption of an attorney's authority only applied to parties other than the attorney and the client. It did not preclude the client from challenging her own attorney's authority.

But Stadtmiller is not attacking her attorneys' authority to act. She never instructed that they lack settlement authority, never instructed them to undo what they had done, and never, according to her deposition testimony, talked with them on the issue. Stadtmiller testified May 25, 1993 that she had never instructed her representative either to settle or not to settle her claim or any portion of it.[43]

Blanton expressly refused the authority requested by her attorney. Stadtmiller never expressed instructions. In *Blanton* all parties, including the judge and defense counsel were aware prior to the action that the attorney lacked authority. Here neither defense counsel nor the civil court that entered the dismissal nor Petitioners had any reason

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[41] *Gagnon Co., Inc. v. Nevada Desert Inn*, 45 Cal.2d 448, 460, 289 P.2d 466 (1955).

[42] *Blanton v. WomanCare*, 38 Cal.3d 396 (1985).

[43] DTE pg. 28.

to believe that Harry Wartnick lacked authority to settle. Blanton took immediate action to remedy her attorney's unauthorized acts. Stadtmiller did absolutely nothing to remedy the alleged unauthorized acts of her attorney. *Blanton* acknowledged that ratification overcomes lack of authority, but found that there was no ratification because the client took immediate steps to remedy the attorney misconduct. Here, neither claimant nor her attorney in the LHWCA case took any action to remedy the allegedly unauthorized settlement for 290 days, and then only as an attempt to avoid the forfeiture provision of § 933(g).

While California recognizes a client's right to challenge unauthorized conduct by her counsel, it at the same time holds the client responsible for the consequences of her attorney's conduct. It is necessary to hold the client responsible for the conduct of her attorney to carry out the purpose of the relevant statute.[44] That very same necessity exists here.

CONCLUSION

The purpose of § 933(g) of the LHWCA is to protect employer lien and credit rights by imposing upon claimants duties (a) to give notice of and (b) to obtain approval for third party settlements. The consequence to claimants for violating those duties is forfeiture of further compensation. Stadtmiller, through her attorneys, has engaged in conduct crafted to frustrate the purpose of the statute,

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[44] *In Re Marriage of Daniels*, 19 Cal.App.4th 1108 (1993).

deny appellants their lien and credit rights, and achieve a double recovery.

The holdings by the Ninth Circuit are prescriptions for abuse and for frustration of Congressional purpose. If those holdings are allowed to stand, the maritime employer lien and credit rights protected so consistently and tenaciously by Congress and this Court for the last sixty years will become a nullity. Claimants will be free to settle away their employers' rights with impunity, through undisclosed oral agreements and by playing a shell game with settlement proceeds.

This Court should grant a writ for the forgoing reasons.

Dated: January 22, 1997

Respectfully Submitted:

ROGER A. LEVY
LAUGHLIN, FALBO, LEVY & MORESI
Two Embarcadero Center
Fifth Floor
San Francisco, California 94111
(415) 781-6676

Counsel of Record for Petitioners

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MALLOTT & PETERSON AND INDUSTRIAL INDEMNITY CO., *Petitioners,* v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR; BEATRICE STADTMILLER, widow of Delbert Stadtmiller, *Respondents.*	No. 94-70927 OWCP No. 13-87454 BRB No. 94-0439 OPINION

Petition for Review of an Order of the Benefits Review Board

Argued and Submitted
April 12, 1996 – San Francisco, California

Filed October 24, 1996

Before: Joseph T. Sneed, William A. Norris, and Charles Wiggins, Circuit Judges.

Opinion by Judge Norris

SUMMARY

Admirality and Marine/Workers Compensation

The court of appeals denied a petition for review of an order of the Benefits Review Board of the Department of Labor. The court held that "representative" does not

include legal counsel acting within an attorney-client relationship for purposes of settling third party claims under the Longshore and Harbor Workers' Compensatior Act (LHWCA).

A claimant under the LHWCA may pursue claims against a third party without forgoing compensation under the LHWCA. The LHWCA protects employers against claimants entering into inordinately low settlements that would deprive the employer of a proper setoff by providing that "a person entitled to compensation (*or the person's representative*)" who enters into a settlement with a third party without the approval of the employer forfeits LHWCA compensation.

Petition Mallott & Peterson (M&P) and its LHWCA insurer, petition Industrial Indemnity Company, (collectively, M&P) owed benefits to respondent Beatrice Stadtmiller under the LHWCA. Stadtmiller was represented by her attorney Harry Wartnick. Certain actions of Wartnick allegedly settled Stadtmiller's claim against third party Waldron Duffy, Inc. without the approval of M&P.

The Board interpreted "representative" to exclude legal counsel acting within the attorney-client relationship and held that M&P was liable to Stadtmiller. The Board also held that the finding of an administrative law judge (ALJ) that Stadtmiller had not ratified any settlement was reasonable in light of the evidence presented.

In its petition for review, M&P contended that the Board misconstrued the term "representative." M&P argued that the term must include legal counsel acting within the scope of the attorney-client relationship.

Stadtmiller and respondent Director of the Office of Workers' Compensation Programs contended that "representative" means the legal representative of a deceased person, such as an executor or administrator, and not legal counsel such as Wartnick. M&P also contended that Stadtmiller ratified the settlement negotiated by Wartnick.

[1] If the provision of the LHWCA to be interpreted is easily susceptible to the Director's interpretation, the reviewing court need go no further. [2] The Director's interpretation of "representative" to mean the legal representative of the deceased, and to exclude legal counsel acting within the attorney-client relationship, is reasonable. [3] The Director's interpretation does not frustrate the purpose of protecting employers from inordinately low settlements because an attorney cannot settle a case without some action by the client, i.e., the claimant or his or her legal representative.

[4] Ratification is a question of fact and M&P bore the burden of proving that Stadtmiller ratified Wartnick's efforts. [5] The ALJ's finding of no ratification was supported by substantial evidence. Even if Stadtmiller had known the details of Wartnick's conduct, it was doubtful that she would have realized the conduct amounted to a settlement or understood enough about the legal consequences of a settlement to have knowingly ratified it.

COUNSEL

Roger A. Levy, Laughlin, Falbo, Levy & Moresi, San Francisco, California, for the petitioners.

Victoria Edises and Anne Landwehr, Kazan, McClain, Edises, Simon & Abrams, Oakland, California; Mark A. Reinhalter, Office of the Solicitor, Department of Labor, Washington, D.C., for the respondents.

OPINION

NORRIS, Circuit Judge:

Section 933 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1988) (LHWCA or Act), establishes a claimant's right to pursue claims for his or her injuries against third parties without forgoing compensation under the Act. Subsection (g), the provision at issue in this case, protects employers against claimants entering into inordinately low settlements that would deprive the employer of a proper setoff available under subsection (f).

Subsection (g) provides that "[i]f the person entitled to compensation (*or the person's representative*)" under the Act enters into a settlement of a claim against a third party without approval of the employer, the person forfeits his or her rights to the LHWCA compensation. 33 U.S.C. § 933(g) (emphasis added). The Benefits Review Board of the Department of Labor (Board) interpreted "representative" as used in § 933(g) to exclude legal counsel acting within the attorney-client relationship. It therefore held that Mallott & Peterson and its LHWCA insurer, Industrial Indemnity (Employer), which owed LHWCA benefits to Beatrice Stadtmiller, were liable to Stadtmiller despite certain actions by her attorney Harry Wartnick which allegedly settled Stadtmiller's claim

against third party Waldron Duffy, Inc. (Waldron) without Employer's approval.[1] *Stadtmiller v. Mallott & Peterson*, 28 Ben. Rev. Bd. Serv. (MB) 304, 1994 WL 661134, at *5 (1994) (per curiam). The Board also held that the finding of the Administrative Law Judge (ALJ) that Stadtmiller had not ratified any settlement was reasonable in light of the evidence presented. *Id.* at *7. Employer timely petitioned pursuant to 33 U.S.C. § 921(c) to have the Board's decision set aside. We deny the petition.

I

Employer argues that the Board misconstrued the term "representative" as used in § 933(g). According to Employer, the way the term "representative" is used in other provisions of the LHWCA, as well as in other statutes, and the general purpose of the LHWCA, establish that "representative" as used in § 933(g) must include legal counsel acting within the attorney-client relationship. Stadtmiller and Respondent Director of the Office of

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[1] Employer argues on appeal that the Board erred when it refused to take judicial notice of a "Notice of Class Action" filed in another case, which allegedly establishes that Stadtmiller had entered into an unapproved settlement of a claim against third party Fiberboard. The Board did not err.

The Board's review is not de novo, and the Notice was not part of the record before the ALJ. Moreover, although the Notice states that Wartnick had settled his existing claims against Fiberboard (and thus was eligible to represent the Class in the other suit), it was not beyond reasonable dispute that Stadtmiller's claim, which is not specifically mentioned in the Notice, was among the ones settled. Thus, the "fact" allegedly established by the Notice is not among the traditional matters of judicial notice. *See* 29 C.F.R. § 18.45; Fed. R. Evid. 201.

Workers' Compensation Programs assert that "representative" in § 933(g) means the legal representative of a deceased person, i.e., an executor or administrator, and thus does not include legal counsel such as Wartnick.

[1] Although decisions of the Board are reviewed for "errors of law," *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 889 (9th Cir. 1993), "considerable weight" is accorded to the statutory construction of the LHWCA urged by the Director. *Hunt v. Director, OWCP*, 999 F.2d 419, 421 (9th Cir. 1993); *see also Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 795 (2d Cir. 1992) (explaining that Secretary of Labor delegated to OWCP " 'all functions of the Department of Labor with respect to the administration of benefit programs' under the [LHWCA] and designated the Director to represent him in all review proceedings. Thus the Director, as the policy-making authority, is to be accorded deference.") (citations omitted). If the Director's interpretation is "reasonable," the court should defer to it. *See Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 158 (1991). Put another way, if the provision to be interpreted is "easily susceptible" to the Director's interpretation, the reviewing court "need go no further." *Hunt*, 999 F.2d at 421.

This deference extends not only to regulations articulating the Director's interpretation, but also to litigating positions asserted by the Director in the course of administrative adjudications, since administrative adjudications are agency action, not post hoc rationalizations for it. *Martin*, 499 U.S. at 156-57.

[2] For the reasons stated by the Board in its decision, *see* Stadtmiller, 1994 WL 661134, at *4-*6, we hold that

the Director's interpretation of "representative" in § 933(g) to mean the "legal representative of the deceased," and to exclude legal counsel acting within the attorney-client relationship, is reasonable. Section 933(c) specifically defines the term "representative" for purposes of § 933. Section 933(c) provides that "legal representative of the deceased" is "hereinafter referred to as 'representative.' " 33 U.S.C. § 933(c); *see also Aetna Life Ins. Co. v. Moses*, 287 U.S. 530, 539 (1932) (interpreting "representative" in § 933(e) to mean "representative of the deceased"). Moreover, only the Director's interpretation of "representative" can be reconciled with the specific language of § 933(g)(1). Section 933(g)(1) refers to entering into settlements "for an amount less than the compensation to which the person (or the person's representative) would be entitled. . . . " As the Board pointed out, "[w]hile a legal representative of the decedent may receive compensation [for a LHWCA claim], his attorney cannot." *Stadtmiller*, 1994 WL 661134, at *5. Attorneys can recover attorney's fees, but they are not entitled to recover "compensation," defined in § 902(12) of the Act as "the money allowance payable to an employee or his dependents. . . . " 33 U.S.C. § 902(12).

[3] We reject Employer's arguments against the Director's interpretation for the reasons stated by the Board. *See Stadtmiller*, 1994 WL 661134, at *5-*6. In addition, contrary to Employer's assertion, the Director's interpretation does not frustrate § 933(g)'s purpose of protecting employers from inordinately low settlements because an attorney cannot settle a case without some action by the client, i.e., the claimant or his or her legal representative. *See Levy v. Superior Court*, 896 P.2d 171, 175-76 (Cal. 1995) (holding that the signature of a party's

attorney is insufficient to create an enforceable settlement under California law); *Blanton v. Womancare, Inc.*, 696 P.2d 645, 650, 653 (Cal. 1985) (invalidating agreement to submit dispute to binding arbitration without possibility of judicial review because it was entered into without client's consent and it impaired client's substantial rights); *Whittier Union High Sch. Dist. v. Superior Court*, 136 Cal. Rptr. 86, 89 (Cal. Ct. App. 1977) ("the law is well settled that an attorney must be specifically authorized to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation"); *accord United States v. Beebe*, 180 U.S. 343, 352 (1901).

II

[4] Employer argues in the alternative that, even if Wartnick is not a "representative" within the meaning of § 933(g), Stadtmiller nonetheless forfeited her benefits because she ratified the settlement negotiated by Wartnick.[2] Ratification is a question of fact. *Common*

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[2] The ALJ held that under applicable California law, an attorney's actions will bind his or her client on agency principles (1) when the attorney has actual authority from the client to enter into the settlement; (2) when the attorney has apparent authority; or (3) when the unauthorized settlement is later ratified by the client. Order denying motion for rescission, dated Oct. 18, 1993, at 9 (citing *Blanton v. Womancare, Inc.*, 696 P.2d 645 (Cal. 1985)). The ALJ found that Wartnick had neither actual nor apparent authority. Employer did not challenge those findings before the Board and does not challenge them here. Instead, Employer contends that Federal law applies, and that

Wealth Ins. Sys., Inc. v. Kersten, 115 Cal. Rptr. 653, 661 (Cal. Ct. App. 1974). Employer bears the burden of proving that Beatrice ratified Wartnick's efforts. *See Gates v. Bank of America Nat'l Trust & Sav. Ass'n*, 261 P.2d 545, 547-48 (Cal. Ct. App. 1953).

Decisions of the Board are reviewed for "adherence to the substantial evidence standard." *Metropolitan Stevedore*, 11 F.3d at 889. The Board's own review of the ALJ's factual findings is similarly limited by the LHWCA. 33 U.S.C. § 921(b)(3) (ALJ's factual findings "shall be conclusive if supported by substantial evidence in the record considered as a whole"). "The Board may not substitute its views for those of the ALJ, but instead must accept the ALJ's findings unless they are contrary to the law, irrational, or unsupported by substantial evidence in the record." *King v. Director, OWCP*, 904 F.2d 17, 18 (9th Cir. 1990) (per curiam) (internal quotation omitted).

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under Federal law, a client is bound by the acts of her attorney. The instances in which the courts are authorized to fashion federal common law are restricted to "those in which a federal rule of decision is 'necessary to protect uniquely federal interests,' and those in which Congress has given the courts the power to develop substantive law." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (citations omitted). Neither category is relevant here. *See Slavin v. Commissioner*, 932 F.2d 598, 601 (7th Cir. 1991) ("Normally the authority of an agent (a lawyer is just a specialized agent) derives from state law; that the substantive dispute concerns federal law does not matter."). Moreover, under federal law, "[w]hile there is a presumption that a settlement entered into by an attorney has been authorized by the attorney's client, rebuttal of the presumption renders any purported settlement ineffective." *Michaud v. Michaud*, 932 F.2d 77, 80 (1st Cir. 1991).

[5] The Board determined that the ALJ's finding that Stadtmiller had not ratified Wartnick's efforts was rational, given the evidence in the record. Ratification requires that the principal, knowing the facts, accepts the benefits of the agent's actions. *See Alvarado Community Hosp. v. Superior Court*, 219 Cal. Rptr. 52, 54-55 (1985). We agree with the Board that the ALJ's finding of no ratification was supported by substantial evidence in the form of testimony by Wartnick and Waldron's attorney that Stadtmiller refused to sign a release in favor of Waldron. Neither Stadtmiller's deposition nor her written declaration required the ALJ to infer that she was aware that Wartnick had dismissed her action against Waldron or that he had received a payment earmarked for her as a result of the dismissal. We join the Board in accepting the ALJ's reasoning that, even if Stadtmiller had known the details of Wartnick's conduct, it is doubtful that she would have realized this conduct amounted to a settlement or have understood enough about the legal consequences of a settlement to have knowingly ratified it. In sum, the Board properly applied the substantial evidence standard when it affirmed the ALJ's finding that Stadtmiller rejected rather than ratified any settlement agreement.[3]

CONCLUSION

We hold that Wartnick is not a representative within the meaning of § 933(g) and the finding that Stadtmiller

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[3] Given the bases of our decision, we need not decide the contested issue whether Wartnick actually reached a settlement with Waldron.

did not ratify Wartnick's actions is supported by substantial evidence. Therefore, we DENY employer's petition to set aside the Board's order.

APPENDIX B

U.S. Department of Labor Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

BRB No. 94-0439

BEATRICE STADTMILLER (Widow of DELBERT STADTMILLER)	)	
Claimant-Respondent	)	DATE ISSUED:
v.	)	OCT 31 1994
MALLOTT AND PETERSON	)	
and	)	
INDUSTRIAL INDEMNITY COMPANY	)	
Employer/Carrier-Petitioners	)	DECISION
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	and ORDER
Respondent	)	

Appeal of the Order Denying Motion for Rescission of Stipulations and Order Denying Motion for Reconsideration of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Victoria Edises and Anne Landwehr (Kazan, McClain, Edises & Simon), Oakland, California, for claimant.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

Mark A. Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Order Denying Motion for Rescission of Stipulations and Order Denying Motion for Reconsideration (92-LHC-2755) of Administrative Law Judge Paul A. Mapes rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The Board held oral argument in this case in San Francisco, California, on August 4, 1994.

Decedent, who was exposed to asbestos while working for employer from 1940 through 1946, filed a claim

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*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

under the Act in June 1990 for asbestos-related cancer. He died from this work-related condition on December 21, 1990. Decedent's widow, the claimant in the current appeal, filed a claim for decedent's disability benefits and death benefits on her own behalf on December 10, 1991. 33 U.S.C. §§908, 909. In February 1993, the parties submitted a proposed stipulation, settling all issues then in dispute, and requested that the matter be remanded to the district director. The case was remanded on February 26, 1993. On March 5, 1993, however, the employer filed a motion for rescission of the stipulations and entry of summary judgment denying the claim. As a basis for this motion, employer alleged that it discovered that in 1992, claimant had entered into a settlement agreement with a third party, without receiving advance approval from employer. Accordingly, employer argued that claimant's right to compensation was barred under Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1), based on this unauthorized settlement. In response to employer's motion, the administrative law judge issued an order vacating the order of remand and directed the district director to return the record to the Office of Administrative Law Judges. Claimant thereafter replied to employer's motion, urging that it be denied.

Claimant had filed a civil suit against several asbestos companies, including Waldron Duffy, Incorporated. She was represented in the third-party action by Harry Wartnick, an attorney representing numerous plaintiffs; claimant's claim against Waldron Duffy was consolidated with numerous similar actions brought by the other plaintiffs. Claimant asserted that she did not authorize Mr. Wartnick to settle her civil action, did not

sign any settlement agreement, and did not receive any settlement money. Claimant further stated that although Mr. Wartnick did receive funds from Waldron Duffy which were offered in return for a settlement of approximately 60 claims against the company, including claimant's suit, she had not been informed of the offer and had neither accepted nor rejected the proposed settlement. These representations were supported by a declaration signed by the claimant on March 8, 1993, and by Mr. Wartnick on March 19, 1993. Thereafter, claimant's counsel submitted a letter, asserting that no further inquiry into this matter was warranted and requesting that employer's motion be denied.

Employer replied to claimant's response, asserting that the representations of claimant and her attorneys were "highly suspect" and were contradicted by the fact that Mr. Wartnick had moved to dismiss claimant's civil action against Waldron Duffy, with prejudice, after he had received Waldron Duffy's settlement offer and funds. Employer also noted that the representations that claimant was not informed of the settlement offer were not consistent with the requirements of the California Business Professional Code that members of the state bar "promptly communicate" all settlement offers to their clients. Finally, employer emphasized that the provisions of Section 33(g) apply to settlements entered into by a claimant as well as settlements entered into by a claimant's "representative."

Based on the affidavits submitted by claimant and Mr. Wartnick denying that a settlement had occurred, the administrative law judge denied employer's motion for summary judgment and scheduled a hearing. Evidence

presented at the hearing indicated that Mr. Wartnick accepted two lump-sum checks from Waldron Duffy's carriers which were intended to cover compensation for the approximately 60 asbestos plaintiffs which the law firm represented. Tr. at 110. Of the amount tendered, $4,500 was supposedly earmarked for claimant. All of the money was placed in the law firm's trust account. While Mr. Wartnick did agree to file a dismissal of claimant's suit against Waldron Duffy, he testified that the attorney for the asbestos carrier, Mr. Jones, had also agreed that the dismissal would be vacated if claimant refused the settlement offer. Mr. Wartnick also testified that he agreed to sign requests for dismissals with the understanding that if a client rejected the offer, Waldron Duffy would reenter the litigation. This procedure was allegedly adopted to facilitate the handling of the large number of cases.[1] Moreover, Mr. Wartnick stated that the dismissal was filed "with prejudice" in error. Finally, the record reflects that on May 20, 1993, the order dismissing the lawsuit was vacated by the California Superior Court for Alameda County pursuant to a stipulation between claimant and Waldron Duffy. Cl. Ex. 5 at 124-125; Tr. at 98.

After the hearing, in an Order Denying Motion for Rescission of Stipulations, the administrative law judge found that neither claimant, nor her "representative" as that term is defined in Section 33(g), entered into a settlement agreement with Waldron Duffy. The administrative

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[1] Mr. Wartnick alleged that this practice was common in the California courts, condoned by them, and grew out of concern that a large percentage of recovery money went toward litigation rather than plaintiffs' recovery.

law judge further determined that claimant was not vicariously bound by the actions of her attorney inasmuch as Mr. Wartnick lacked actual or apparent authority to enter into the settlement on claimant's behalf and claimant had not ratified the unauthorized settlement. Accordingly, the administrative law judge concluded that as claimant was not bound by the unauthorized efforts of her counsel to settle her case, her right to benefits under the Act was not barred under Section 33(g). Accordingly, he found it unnecessary to decide whether Mr. Wartnick's actions, did, in fact, constitute the execution of a settlement. The administrative law judge further determined that even if, as employer contended, the dismissal with prejudice could not be vacated even with the consent of the parties because it became final under California law, and, as a result, employer might be unable to obtain any recovery from Waldron Duffy, the result would not be that claimant's claim is barred under Section 33(g) inasmuch as Section 33(g) applies only where a person "entitled to compensation" or that person's "legal representative" either directly or through the authorized actions of an attorney enters into an [sic] third-party settlement. In an Order Denying Motion for Reconsideration dated November 26, 1993, the administrative law judge reaffirmed his finding that Mr. Wartnick was not claimant's legal representative under Section 33(g) and that claimant had done nothing to ratify his unauthorized settlement.

On appeal, employer, incorporating its post-trial brief, argues that claimant's attorney in the civil lawsuit, Harry Wartnick, is her "representative" as that term is used in Section 33(g) and that because a settlement occurred under California law, claimant is precluded

from receiving benefits under the Act. Employer argues, in the alternative, that under California agency law, claimant is bound by the actions of her attorney, who dismissed the civil action against Waldron Duffy with prejudice, and cashed the settlement check and retained the proceeds, conduct consistent with the execution of a settlement. Employer further avers that the California Superior Court for Alameda County lacked subject matter jurisdiction to vacate the dismissal of claimant's civil action on May 20, 1993, because under Section 473 of the California Code of Civil Procedure such an action had to have been instituted within six months of the initial order of dismissal.

Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond that the administrative law judge properly found that Section 33(g) was inapplicable on the bases that claimant did not execute a third-party settlement, Mr. Wartnick was not her legal representative under Section 33(g), and she was not otherwise bound by his unauthorized actions. They thus assert that his Order Denying Motion for Rescission should be affirmed. Both employer and claimant have filed reply briefs which essentially reiterate the arguments made in their other briefs.

"Representative" Under Section 33(g)

Initially, we reject employer's assertion that Harry Wartnick, claimant's counsel in the third-party suit, was her "representative" as that term is used in Section 33(g)(1) of the Act. Section 33(g)(1), as amended in 1984, states:

> (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the district director within thirty days after the settlement is entered into.

33 U.S.C. §933(g)(1) (1988). In his Order Denying Employer's Motion for Reconsideration, the administrative law judge considered and rejected employer's argument, which it reiterates on appeal, that the term "representative" in subsection 33(g) includes attorneys, as other sections of the Act and other laws enacted by Congress use the term "representative" to refer to attorneys.

In so concluding, the administrative law judge noted that Section 33(c) of the Act, 33 U.S.C. §933(c), explicitly states that as used in Section 33, the term "representative" shall mean the "legal representative" of a decedent. He reasoned that since statutory terms should be given their ordinary meaning, and "legal representative" is a term that ordinarily does not include attorneys, Congress thereby indicated that it did not intend to include attorneys in the term "representative." The administrative law

judge further determined that interpreting the term "representative" to mean "legal representative" of the decedent allows for a reasonable interpretation of the portion of Section 33(g)(1) which refers to a settlement with a third person "for an amount less than the *compensation to which the person (or the person's representative) would be entitled* under this Act." (emphasis added). The administrative law judge noted that if this portion of Section 33(g) were interpreted as referring to attorneys, as urged by the employer, this provision would not make any sense, as attorneys can only recover attorney's fees, but are never entitled to recover "compensation," defined in subsection 2(12) of the Act as "the money allowance payable to an employee or his dependents." 33 U.S.C. §902(12). Finally, the administrative law judge relied upon *Kem Manufacturing Corp. v. Wilder*, 817 F.2d 1517 (11th Cir. 1987), and *Mobay Chemical Company v. Hudson Foam Plastics Corp.*, 277 F. Supp. 413 (S.D.N.Y. 1967). Both cases involve interpretation of Federal Rule of Civil Procedure 60(b) which states that a "court may relieve a party or his legal representative from a final judgment, order, or proceeding. . . . " In both cases, the court recognized that a legal representative is one who stands in the place of, or instead of, another such as an heir at law and does not include legal counsel within the context of the attorney-client relationship. *Kem*, 817 F.2d at 150; *Mobay*, 277 F.Supp. at 416.

Employer argues on appeal that while "legal representative" most commonly denotes an executor or administrator of an estate, according to Black's Law Dictionary, the term is given different meanings in differing contexts. Employer asserts that the administrative law judge erred

in construing the term narrowly in interpreting Section 33(g). Citing *Graves v. United States Coast Guard*, 692 F.2d 91 (9th Cir. 1982), employer contends that "legal representative" may include an attorney and that the administrative law judge erred in concluding otherwise. Employer further asserts that Section 33(c) is not even applicable in the present case, because it deals only with the situation where a death occurs without survivors, in which case the compensation payments are made to the Special Fund. Employer asserts that in such a case the person entitled to compensation is the administrator of an estate and thus his or her "representative" cannot also be the administrator. Citing *Estate of Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992), employer contends that because the term "representative" is used in Section 33(g) rather than "legal representative," the administrative law judge erred in failing to interpret the term "representative" consistent with its usage elsewhere in the statute. Finally, employer asserts that if the term "representative" in Section 33(g) is not interpreted to include an attorney, the purpose of 33(g), i.e., the protection of employer, will be frustrated, since if interpreted otherwise, "an attorney may do that which a claimant may not."

We reject employer's argument that Mr. Wartnick was claimant's "representative" for purposes of Section 33(g). The administrative law judge's construction is consistent with the plain language of the statute, which, as stated in *Cowart*, is the starting point of statutory construction. In *Cowart*, the Court found that its interpretation of the term "person entitled to compensation" in Section 33(g)(1) was reinforced by the fact that the term

as it appeared elsewhere in the statute could not bear the meaning placed on it by claimant. *Cowart*, ___ U.S. ___, 112 S.Ct. at 2596, 26 BRBS at 52 (CRT). Moreover, where, as here, the statute as written is clear, the Court held that effect must be given to the plain language. See *Cowart*, ___ U.S. ___, 112 S.Ct. at 2594, 26 BRBS at 51 (CRT).

Section 33(c) explicitly refers to the "assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as 'representative')" when an employee dies without statutory dependents. 33 U.S.C. §933(c). The term "representative" next appears in subsection (g)(1). Therefore, the logical interpretation of the plain language is that "representative" in subsections following subsection (c) means "legal representative of the deceased." That the term "representative" may be used in other contexts elsewhere in the statute is irrelevant in light of this clear directive. Moreover, as was noted by the administrative law judge, interpreting the term "representative" in this manner allows for a reasonable reading of the portion of Section 33(g)(1) which refers to entering into a third-party settlement for an amount less than the compensation to which the "person (or the person's representative)" would be entitled. While a legal representative of the decedent may receive compensation, his attorney cannot. Finally, the administrative law judge's interpretation accords with a basic tenet of statutory construction: the specific takes precedence over the general. See, e.g., *Rasmussen v. General Dynamics Corp.*, 993 F.2d 1014, 27 BRBS 17 (CRT) (2d Cir. 1993); *McPherson v. National Steel and Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992); see generally *Markair, Inc. v. Civil Aeronautics Board*, 744 F.2d 1383 (9th

Cir. 1984). In addition, the administrative law judge's interpretation of the term "representative" as being limited to legal representatives of a decedent who would be entitled to recover compensation under the Act is consistent with *Mobay* and *Kem*, and his decision to credit these cases over the cases relied upon by the employer was rational. See generally *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984).

While employer contends that *Graves*, 692 F.2d at 71, mandates a contrary interpretation, we disagree. In *Graves*, a quadriplegic brought a claim under the Federal Tort Claims Act, which was signed by his attorney because plaintiff allegedly could not write himself due to injuries he sustained in a diving accident. In rejecting the government's argument that the case should be dismissed because the documents were signed by the attorney without evidence of his authority to do so, the court interpreted a portion of a regulation which read:

> A claim presented by an agent or legal representative shall be presented in the name of the claimant, be signed by the agent or legal representative, show the title or legal capacity of the person signing, and be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

28 C.F.R. 14.3(e) (emphasis added). Although employer argues that *Graves* demonstrates that in the Ninth Circuit an attorney is a legal representative, this result does not follow. The attorney in *Graves* may have, in fact, been

acting as the agent of the physically incapacitated claimant, an interpretation bolstered by the court's later discussion of agency law. 692 F.2d at 74. Accordingly, the administrative law judge's finding that claimant's civil attorney was not her "representative" as that term is used in Section 33(g)(1) of the Act is affirmed.

Agency

In light of our determination that the administrative law judge properly found that Mr. Wartnick was not claimant's "legal representative," we must next address employer's argument that claimant's claim is barred under Section 33(g) on the basis that claimant was bound by Mr. Wartnick's actions on agency principles. Initially, the administrative law judge found that under applicable California law, the attorney may bind the client in three circumstances: where the attorney has actual authority to enter the settlement, the attorney has apparent authority, or an unauthorized settlement is later ratified by the client. Employer does not challenge the administrative law judge's findings that Mr. Wartnick lacked either actual or apparent authority to enter into the third-party agreement. Instead, employer reiterates the argument it made below that the settlement was ratified and thus claimant was vicariously bound by Mr. Wartnick's actions in entering into the unauthorized settlement because she did not take immediate action to repudiate his actions, such as firing him.

Generally, the attorney-client relationship, insofar as it concerns authority of the attorney to bind his client by

agreement or stipulation, is governed by agency principles. *Blanton v. Womancare, Inc.*, 38 Cal. 3d 396, 212 Cal. Rptr. 151, 696 P.2d 645 (1985). As the administrative law judge found, under California law, "the client as principal is bound by the acts of the attorney-agent within the scope of his actual authority (express or implied); or his apparent or ostensible authority; or by unauthorized acts ratified by the client." *Id.*; *Yanchor v. Kagan*, 22 Cal. App. 3d 544, 549, (1971). An attorney is not authorized merely by virtue of his retention in litigation, to "impair the client's substantial rights on the course of action itself." *Blanton*, 38 Cal. 3d at 404, 212 Cal. Rptr. at 156, 696 P.2d at 650, quoting *Linsk v. Linsk*, 70 Cal. 2d 272, 276 (1969). The law is well settled that an attorney must be specifically authorized to settle and compromise a claim; he has no ostensible authority merely on the basis of his employment to bind his client to a compromise settlement of pending litigation. *Id., citing Whittier Union High School Dist. v. Superior Court*, 66 Cal. App. 3d 504, 508 (1977); *Linsk*, 70 Cal. 2d at 278. It is also a well-settled rule of agency that a principal will be held to have ratified the agent's actions where he voluntarily accepts the benefits of the unauthorized transaction. *Alvarado Community Hospital v. Superior Court of San Diego City*, 173 Cal. App. 3d 476, 481, 219 Cal. Rptr. 52, 54 (1985), citing RESTATEMENT (SECOND) OF AGENCY §98 (1958). The receipt, by a purported principal who knows the facts, of things to which he would not be entitled unless the transaction were ratified, indicates his consent to become a party to the transaction as it was made. *Id.*, 173 Cal. App. 3d at 482, 219 Cal. Rptr. at 55. *See, e.g., Fidelity and Casualty*

Company v. Abraham, 70 Cal. App. 2d 776, 161 P.2d 689 (1945).

Employer's ratification argument is rejected. On the facts presented in the present case, the administrative law judge rationally found that claimant did not ratify the agreement in question because she had not been fully informed about the unauthorized acts of her counsel and did not obtain any benefit from his actions. *Horner v. Ferron*, 362 F.2d 224, 231 n.10 (9th Cir. 1966). Employer argues on appeal, as it did below, that claimant's March 8, 1993, declaration in which she indicated that she had not authorized Mr. Wartnick to settle her civil action is sufficient to establish that claimant knew of the settlement by that date. Employer contends that inasmuch as she testified that she did not discuss this subject again with her attorney until May 25, 1993, two-and-a-half months later, she ratified the agreement by her inaction. We disagree.

In rejecting this argument, the administrative law judge reasonably determined that while claimant's deposition and written declaration indicate that she had not authorized Mr. Wartnick to settle her civil case and thus had some knowledge of the attempted settlement, these documents fail to establish that claimant was aware of the key details of the agreement. Specifically, they do not establish that she was aware that Mr. Wartnick had dismissed her action against Waldron Duffy with prejudice or that he received $4,500 in settlement funds. Likewise, although Mr. Wartnick testified that an unidentified person in his office allegedly informed claimant of "an offer" of $4,500 from Waldron Duffy, the administrative law judge reasonably found that this testimony was not sufficient to establish that claimant was contacted, given that

Mr. Wartnick could not specify who made the call or when it was made and that the only offer claimant could recall was for $20,000 in connection with her Longshore claim. Dep. of Cl. at 16-17. The administrative law judge also rationally reasoned that even if claimant had been fully informed of Mr. Wartnick's unauthorized actions, it is unlikely that she would have understood their legal implication, noting that even the attorneys involved denied that there was a settlement and that claimant would have relied on their assertions. Finally, the administrative law judge properly found that the law does not require a client to fire her attorney to avoid ratification of unauthorized acts and that claimant's refusal to sign a release, her repudiation of the agreement and her refusal to accept the money were actions inconsistent with ratification. Because the administrative law judge's finding that claimant did not ratify the purported settlement is rational, supported by the record, and in accordance with law, it is affirmed. *See Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53, 61-62 (1992). Accordingly, as Mr. Wartnick was not claimant's legal representative, claimant did not enter the agreement herself, and claimant was not otherwise bound by Mr. Wartnick's actions on agency principles, the administrative law judge's finding that Section 33(g) is inapplicable on the facts presented is also affirmed.

Settlement

Finally, employer argues that regardless of the intent of the parties, Mr. Wartnick's actions resulted in the execution of a settlement and dismissal of the civil action. In support, employer cites a communication by Roderic Jones, counsel for Waldron Duffy, to his clients that "we have settled," and his request that settlement drafts be prepared which would be provided to Mr. Wartnick in exchange for either releases or dismissals, in support of its assertion. Employer also points out that claimant's civil attorney dismissed the civil action against Waldron Duffy with prejudice and cashed the settlement checks and retained the proceeds for eight-and-a-half months, indicia of an executed agreement under California law.[2] Employer further avers that the California Superior Court for Alameda County lacked subject matter jurisdiction to vacate the dismissal of the lawsuit because under California law, such an action must be taken within six months of the dismissal. Finally, employer contends that claimant's reliance on *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT) (9th Cir. 1992), and *Rosario v. M. I. Stevedores*, 17 BRBS 50 (1985), in support of its argument that no settlement occurred, is misplaced.

Claimant responds that the fact that her civil counsel received a lump sum settlement check for all civil offers made by Waldron Duffy and then mistakenly allowed a dismissal with prejudice to be filed does not indicate that

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[2] The evidence indicates that two checks totaling $180,750 were sent to Mr. Wartnick's law firm from two carriers for Waldron Duffy to cover the purported settlement for the 60 plaintiffs represented by the law firm. Emp. Ex. H at 99, 104.

a settlement occurred, inasmuch as these actions were transient; the monies were ultimately returned and the dismissal of the claim was ultimately vacated by the Superior Court. Citing Chavez and Rosario, claimant asserts that employer errs in equating a dismissal which was subsequently vacated with an executed settlement and that such circumstantial evidence of a settlement does not mandate a finding of a third-party settlement, where, as here, there is overwhelming evidence to the contrary.

In the present case, the administrative law judge properly determined that it was unnecessary for him to reach this issue in light of his conclusions that Mr. Wartnick was not claimant's legal representative for Section 33(g) purposes and that she was not otherwise bound by his unauthorized efforts to settle the civil claim. Because we are affirming the administrative law judge's findings in this regard, we also need not reach this issue; even if a settlement did occur, it would not be binding on the claimant. Nonetheless we note that in *Chavez*, the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction the present case arises, refused to find a third-party settlement occurred exclusively on the basis of documentary evidence, including formal court papers suggestive of the existence of a settlement where, as here, there was countervailing evidence indicating otherwise. In *Chavez*, claimant brought a claim for longshore compensation for an asbestos-related injury as well as a civil suit against various asbestos manufacturers, suppliers, and distributors. Two of the defendants in the third-party action were Keene Corporation and Armstrong World Industries, Inc. Chavez's claims were consolidated with

numerous civil actions against the same defendants brought by other plaintiffs. An order, with Chavez named as the lead plaintiff, was filed in a California Superior Court purportedly approving a "good faith settlement" between Keene and the asbestos plaintiffs, including Chavez. In refusing to find a settlement by claimant in *Chavez*, the court acknowledged that the court order "approving" Keene's settlement with Chavez was "circumstantial evidence from which the inference could be drawn" that Chavez had settled his case with Keene. *Chavez*, 961 F.2d at 1413, 25 BRBS at 140 (CRT). The Ninth Circuit acknowledged as well that a letter written by Armstrong's lawyer and "agreed and acknowledged" by Chavez's lawyer, which recited that Chavez's case against Armstrong had been settled, could also be circumstantial evidence of the existence of a settlement between Chavez and Keene. The *Chavez* court nonetheless concluded that the existence of such evidence did not require a finding of a settlement for purposes of Section 33(g) where, as in the present case, claimant, claimant's attorney, and the third-party defendant's attorney testified that no settlement had occurred, that no release had been signed, and that no funds had been received by the claimant. *Chavez*, 961 F.2d at 1413, 25 BRBS at 140 (CRT). A similar result was reached by the Board in Rosario, 17 BRBS at 50.

In this case, there is documentary evidence of an order vacating the dismissal of the suit, as well as testimony from claimant, Mr. Wartnick, and Mr. Jones, counsel for Waldron Duffy, to the effect that no settlement had occurred. It would thus appear that pursuant to Chavez and Rosario, there was no settlement on the facts presented, as a matter of law. While employer alleges that

the dismissal was not properly vacated because the action was not taken within the six-month period required by California law, this administrative proceeding is not the proper forum to raise this argument. Orders of a state court are not generally subject to collateral attack before the Board. *See generally Hudson v. Puerto Rico Marine, Inc.*, 27 BRBS 183, 186-187 (1993). Finally, although employer suggests that it will somehow be prejudiced if the claimant is not bound to the settlement, we disagree. Section 33(g) was intended to protect the employer from the injured employee's acceptance of too little for his cause of action. *See Banks v. Chicago Grain Trimmers Assoc.*, 390 U.S. 459 (1968), *reh'g denied*, 391 U.S. 929 (1968). Where claimant has yet to settle her third-party claim, employer can suffer no prejudice for Section 33(g) purposes.

Accordingly, the administrative law judge's Order Denying Motion for Rescission of Stipulations and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

/s/ Nancy S. Dolder
NANCY S. DOLDER, Acting
Chief Administrative Appeals
Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ Robert J. Shea
ROBERT J. SHEA
Administrative Law Judge

APPENDIX C

U.S. Department of Labor

(415) 744-6577

Office of Administrative Law Judges
211 Main Street – Suite 600
San Francisco, California 94105
FAX (415) 744-6569

In the Matter of BEATRICE STADTMILLER (widow of Delbert Stadtmiller), Claimant, v. MALLOTT & PETERSON, Employer, and INDUSTRIAL INDEMNITY, Insurer.	Case No. 92-LHC-2755 OWCP No. 13-87454

Appearances:

Victoria Edises, Esquire
Kazan, McClain, Edises & Simon
171 12th Street, Suite 300
Oakland, California 94607
For the Claimant

Roger A. Levy, Esquire
Laughlin, Falbo, Levy & Moresi
Two Embarcadero Center, Fifth Floor
San Francisco, California 94111-3823
For the Employer

Before: Paul A. Mapes
Administrative Law Judge

ORDER DENYING MOTION FOR RESCISSION OF STIPULATIONS

This case involves a claim arising under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter, the "Act" or the "Longshore Act"), 33 U.S.C. §901 *et seq.* The claimant is the widow of a deceased longshore worker who allegedly acquired a fatal asbestos-related illness while doing work subject to the provisions of the Longshore Act. In February of 1993 the parties submitted proposed stipulations settling all issues then in dispute and requested that the matter be remanded to the District Director. Accordingly, on February 26, 1993, the matter was remanded. However, on March 5, 1993, the employer/insurer (hereinafter, "the employer") filed a motion seeking rescission of the stipulations and entry of a summary judgment order denying the claim in its entirety. As grounds for such motion counsel for the employer represented that he had just discovered information indicating that sometime in 1992 the claimant, without receiving the advance approval of the employer, had entered into an agreement settling a law suit she had previously initiated against Waldron Duffy, Inc., for the wrongful death of her husband. In its motion the employer contended that pursuant to the provisions of subsection 33(g) of the Act such an unauthorized settlement precludes the claimant from any entitlement to Longshore Act benefits.

In view of the employer's motion, on March 10, 1993, I issued an order vacating the order of remand and directing the District Director to return the record in this case to the Office of Administrative Law Judges.

On March 15, 1993, the claimant filed a reply to the employer's motion. In the reply the claimant represented that she had not authorized her attorney in the wrongful death action to settle her civil lawsuit against any asbestos manufacturer, had not signed any civil settlement papers, and had not received any civil settlement monies. It was further represented that the attorney representing the claimant in the civil suit, Harry Wartnick, had received funds from Waldron Duffy that were offered in return for a settlement of the claimant's civil case, but that the claimant had not been informed of the offer and had neither accepted or rejected the proposed settlement. These representations were supported by a declaration signed by the claimant on March 8, 1993, and by a declaration signed by Mr. Wartnick on March 19, 1993. On April 13, 1993, the claimant's counsel submitted a letter asserting that no further inquiry into this matter was warranted and requesting that the employer's motion be denied.

In an April 14, 1993 reply to the claimant's response, the employer asserted that the representations of the claimant and her attorneys were "highly suspect" and indicated that the employer desired to take depositions in order to enquire further into these representations. The employer went on to argue, in effect, that the representations of the claimant and Mr. Wartnick that no settlement had occurred were contradicted by the fact that Mr. Wartnick moved to dismiss the claimant's civil action against Waldron Duffy with prejudice after he received Waldron Duffy's settlement offer and funds. The employer also noted that the representations that the claimant had been unaware of the settlement offer were inconsistent with

the California Business and Professional Code's requirement that members of the state bar "promptly communicate" all settlement offers to their clients. In addition, the employer emphasized that the provisions of section 33(g) apply both to settlements entered into by a claimant and settlements entered into by a claimant's "representative."

Since both the claimant and Mr. Wartnick submitted affidavits denying that any settlement occurred, I concluded that there was a genuine issue of material fact and that therefore an order of summary judgment could not be issued. Accordingly, on April 16, 1993, I issued an order denying the employer's motion for summary judgment and scheduling this matter for an evidentiary hearing. The hearing was held in San Francisco, California, on June 22, 1993. At the hearing both the claimant and the employer were represented by counsel and the following exhibits were admitted into evidence: Employer Exhibits (EX) A-H; Claimant Exhibits (CX) 1-6. At the conclusion of the hearing counsel for both parties agreed that the previously-approved stipulations would control the resolution of this claim should it be determined that the claim is not barred under the provisions of subsection 33(g). Tr. at 137-38.

SUMMARY OF THE EVIDENCE

The relevant evidence consists of various documentary exhibits and the testimony of five witnesses.

A. Summary of Documentary Evidence

The record contains six documents relating to a possible unauthorized settlement of the claimant's civil action against Waldron Duffy.

The first two relevant documents are letters from Victoria Edises, the attorney representing the claimant in her action under the Longshore Act, to Mr. Wartnick. In the first of these letters, which is dated April 16, 1992, Ms. Edisis advised Mr. Wartnick that as a claimant under the Longshore Act Mrs. Stadtmiller "cannot accept any civil settlements without the consent of the longshore compensation insurance carrier," and requested that she be advised if any offers were received so that approval of such a settlement might be requested from the longshore carrier. CX 3 at 122. The second letter to Mr. Wartnick from Ms. Edises was sent on June 9, 1992, and essentially repeated the statements made in the April 16 letter. CX 4 at 123.

The next relevant document is an August 4, 1992 letter from Roderick D. Jones, an attorney representing the defendant in the claimant's civil action against Waldron Duffy, to the company's two insurance carriers – The Ohio Casualty Group and Hanover Insurance Company. The letter stated that Mr. Jones had "settled" 60 cases against Waldron Duffy for a total of $180,750. The letter also stated that the names of the cases were itemized on an attached "settlement list" and requested checks "which we will exchange for the properly executed releases and/or dismissals." EX H at 106. A excerpt from the attached "settlement list" set forth the figure $4500 next to the name Stadtmiller. EX H at 106, 108.

The next two documents are copies of checks issued on behalf of The Ohio Casualty Group and Hanover Insurance Company. The check for Ohio Casualty was in the amount of $120,500 and was made payable to Mr. Wartnick's law firm "in trust for various asbestos plaintiffs." EX H at 104. The check issued on behalf of Hanover Insurance Company was in the amount of $60,250 and was also payable to Mr. Wartnick's law firm "in trust for various asbestos plaintiffs." EX H at 99. The Ohio Casualty check was dated August 14, 1992, and the Hanover check was dated August 21, 1992.

The next to the last document is a Request for Dismissal that was filed with the Alameda County (California) Superior Court in the case of Beatrice Stadtmiller v. Raybestos-Manhattan, Inc., et al. on September 8, 1992. The Request for Dismissal is signed by Mr. Wartnick and specifies that the dismissal should apply only to Waldron Duffy and should be "with prejudice." EX A. The document shows that the dismissal was granted on September 11, 1992.

The final document is a stipulation between Beatrice Stadtmiller and Waldron Duffy that was filed on May 20, 1993, in the Alameda County Superior Court. It requested that the September 11, 1992 dismissal of Mrs. Stadtmiller's civil action against Waldron Duffy be vacated and set aside. CX 5 at 124-25. The stipulation was signed by Mr. Wartnick on behalf of Mrs. Stadtmiller and by Mr. Jones on behalf of Waldron Duffy. Pursuant to this stipulation the dismissal of the claimant's civil action against Waldron Duffy was vacated by the Superior Court on May 21, 1993. Tr. at 98.

B. Summary of Testimonial Evidence

The following is a summary of the relevant testimony of each of the witnesses.

Harry Wartnick Mr. Wartnick testified that he began representing the claimant in her civil action after the case was referred to him in the Spring of 1992 by the firm representing the claimant in her Longshore Act claim. Tr. at 48. During his testimony, Mr. Wartnick acknowledged that he had engaged in negotiations with Mr. Jones concerning possible settlement of a group of 59 or 60 asbestos cases against Waldron Duffy and that the group included Mrs. Stadtmiller's case. Tr. at 69. He further admitted that as a result of these negotiations Mr. Jones made an offer to settle the Stadtmiller case for $4500. Tr. at 69. He also acknowledged that as a result of his negotiations with Mr. Jones the insurers for Waldron Duffy sent checks to his firm which included the $4500 for the settlement of the Stadtmiller case, and that this money was not returned to the insurers until May of 1993 when he and Mr. Jones agreed to have the dismissal of Mrs. Stadtmiller's action against Waldron Duffy vacated. Tr. at 59, 99. Mr. Wartnick further admitted that he had signed the Request for Dismissal of Mrs. Stadtmiller's civil action "anticipatory" of the client accepting Waldron Duffy's offer. Tr. at 63. Mr. Wartnick described his decision to allow the dismissal to be granted "with prejudice" as a "mistake," and said that he routinely agrees to dismissals without prejudice based on settlement offers alone and without receiving the advance approval of his clients. Tr. at 64, 68, 70.

Mr. Wartnick, however, refused to characterize his actions as constituting a settlement of the claimant's civil

action against Waldron Duffy. Tr. at 51, 109. Rather, he viewed his discussions with Mr. Jones as merely constituting negotiations for the purpose of arriving at an offer that he could recommend to his client. Tr. at 52, 59, 66. In this regard, he contended that he never had any authority from Mrs. Stadtmiller to settle any part of her civil case. Tr. at 49, 50. He also noted that he had never sent releases to Mrs. Stadtmiller for her signature and had held the $4500 in a trust account rather than distributing it to Mrs. Stadtmiller. Tr. at 50, 53, 70. Mr. Wartnick also expressed the opinion that a signed release is necessary to settle a case and testified that in his experience all asbestos defendants but one insist on receiving signed releases before settlement funds are distributed to clients. Tr. at 74, 77, 79. He also asserted that Mr. Jones insists on receiving such a release before funds are disbursed to a client. Tr. at 74. Mr. Wartnick further testified that it was his "understanding" with Mr. Jones that the dismissal of Mrs. Stadtmiller's civil action would be set aside if Mrs. Stadtmiller rejected the offer. Tr. at 63. He also stated that Mrs. Stadtmiller had rejected the offer and that, as a result, Mr. Jones "did honor the discussions and agreement that we had." Tr. at 64. Although Mr. Wartnick asserted that Mrs. Stadtmiller had in fact considered and rejected the settlement offer in April or May of 1993, he admitted that he did not communicate with Mrs. Stadtmiller directly and did not know who in his firm had done so. Tr. at 99, 102, 103, 117, 119.[1]

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[1] At one point during his testimony Mr. Wartnick indicated that "we," (presumably his law firm) "did not talk directly" to Mrs. Stadtmiller about the offer and had instead communicated the offer to the law firm that is handling Mrs. Stadtmiller's

Roderick D. Jones The testimony of Mr. Jones was taken by deposition on May 27, 1993. During the deposition Mr. Jones testified that during the late summer of 1992 he had negotiated with Mr. Wartnick concerning the possible settlement of a group of cases against Waldron Duffy, including Mrs. Stadtmiller's. EX F at 60-61. Mr. Jones also indicated that as a result of the negotiations he and Mr. Wartnick achieved "some sort of an understanding" about how much money Waldron Duffy would pay to settle the group of cases. EX F at 61. The understanding encompassed both the total amount and the amount to be paid on each individual case, although Mr. Jones also indicated that he didn't really care how Mr. Wartnick divided up the total amount among the individual plaintiffs. EX F at 62. Thereafter, Mr. Jones believes, his firm prepared the Request for Dismissal in the Stadtmiller case and arranged to have it signed by Mr. Wartnick before the checks from the insurance company were sent to Mr. Wartnick's firm. EX F at 58, 65. Mr. Jones also indicated that at the time he agreed with Mr. Wartnick on the $4500 settlement amount for the Stadtmiller case he was not sure whether Mr. Wartnick had the authority to settle Mrs. Stadtmiller's case or whether Mr. Wartnick was just agreeing to recommend that settlement amount to his client. EX F at 77. However, he also testified that the Request for Dismissal was filed because he thought there was a settlement and that he thereafter thought that the matter had been "laid to rest." EX F at 83, 69.

Longshore Act claim. Tr. at 100. It appears from the context, however, that this statement only applied to the period between the receipt of the offer in August of 1992 and late March of 1993. *Id.*

After the dismissal of Mrs. Stadtmiller's case, Mr. Jones testified, he heard nothing more concerning the matter until May of 1993 when he received two telephone calls from Mr. Wartnick. During those calls he was informed by Mr. Wartnick that Mrs. Stadtmiller had refused to sign a release. EX F at 58, 67-68. At the same time, he testified, Mr. Wartnick asked him if he would sign a stipulation to have the dismissal of Mrs. Stadtmiller's case vacated. EX F at 68-69. Mr. Jones testified that he responded to this request by expressing concern about exposing his client to additional litigation or cost. EX F at 69. Ultimately, Mr. Jones testified, he agreed to enter into the stipulation "with the understanding that we couldn't enter into any negotiations again to settle the case once the longshoreman's case had been resolved." EX F at 69. This means, Mr. Jones explained, that he does not anticipate having any future discussions about the merits of the Stadtmiller claim and that "[i]t's going to be the amount that we paid before." *Id.* He said he believes that Mr. Wartnick has the same understanding, although there is nothing in writing to memorialize that understanding. EX F at 70. Mr. Jones also indicated that his firm has received a check from Mr. Wartnick's firm for the exact amount that was allocated for the settlement of Mrs. Stadtmiller's case. EX F at 71.

Mr. Jones also testified that although his firm requires opposing counsel to provide signed dismissal requests before a settlement check is delivered to the opposing counsel, formal written and signed releases "come later." EX F at 65. Mr. Jones responded affirmatively when asked if it is his understanding that the agreement he made with Mr. Wartnick was "contingent"

upon receiving signed releases from Mrs. Stadtmiller and the other plaintiffs in that case. EX F at 77, 78. He further testified that it is his "custom and practice" not to consider a settlement complete unless there is a written release. EX F at 77. He acknowledged, however, that there may be some cases in his office in which a written release was never received. EX F at 78. He then added that "as long as I have the dismissal I feel somewhat comfortable." *Id.* He also indicated that it is his opinion that under California law a settlement is unenforceable without a written settlement agreement. EX F at 75.

Beatrice Stadtmiller The testimony of Mrs. Stadtmiller was taken by deposition on May 25, 1993. Her testimony indicates that she was 75 years old at the time the deposition was taken. CX 1 at 4. In her testimony she also indicated that she had never directly given anyone at Mr. Wartnick's firm any instructions of any sort concerning the firm's authority to settle her civil case, but was aware that her attorney in the Longshore Act case had instructed Mr. Wartnick not to enter into any settlement agreements without the consent of the insurer for the Longshore Act employer. CX 1 at 19, 22. Mrs. Stadtmiller also testified that although she had never spoken to Mr. Wartnick about any settlement of her civil case, she believed she had been contacted by a woman in Mr. Wartnick's firm who asked her if she would take $20,000 for her case. CX 1 at 18, 15-17. Mrs. Stadtmiller stated that she had told the woman that she would refuse to accept that amount. CX 1 at 16-17. She was unsure, however, when the call occurred and was unable to recall any other details about the conversation. *Id.* Her testimony also indicated that she had not received any money from her

civil law suit and had never authorized dismissing any of the defendants in that law suit. CX 1 at 20. She also said she had "no idea" about the current status of that case. CX 1 at 19.

Irine Dennie and Norman Gordon Irine Dennie is a claims manager for the insurer in the Longshore Act case and Norman Gordon is a legal assistant in the law firm representing the employer and insurer in that case. Ms. Dennie testified that she has responsibility for the Stadtmiller claim and that no one had requested her consent to any third-party settlement in connection with that claim. Tr. at 123. Likewise, Mr. Gordon testified that he is familiar with his law firm's files on the Stadtmiller claim and indicated that the firm had never received notice from any of Mrs. Stadtmiller's attorneys concerning a proposed settlement of Mrs. Stadtmiller's civil case. Tr. at 130-31.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Subsection 33(g) of the Longshore Act provides that if "a person entitled to compensation (or the person's representative) enters into a settlement" with a third party tortfeasor for an amount less than the compensation to which "the person (or the person's representative)" would be entitled under the Act, the person shall forfeit his or her right to compensation unless the responsible employer and insurance carrier grant written approval to the settlement "before the settlement is executed." *See also Estate of Cowart v. Nicklos Drilling Co.*, ___

U.S. ___, 112 S. Ct. 2589 (1992). Thus, the foregoing statutory language in effect provides that a claim for compensation will be barred under subsection 33(g) if two preconditions are satisfied. First, a person entitled to compensation or the person's "representative" must enter into a settlement with a third person. Second, the settlement must be "executed" before written authorization is obtained from the responsible employer and insurance carrier.

It is clear from the evidentiary record that the claimant did not herself directly enter into a settlement agreement with Waldron Duffy. It is also clear that no "representative," as that term is used in subsection 33(g) is involved in this case.[2] Thus, it may appear that no one within the scope of the statutory language has entered into a settlement agreement that could preclude the claimant from recovering benefits under the Act. The employer contends, however, that even though the claimant may not have directly entered into a settlement, she is vicariously bound by the actions of her attorney, Mr. Wartnick, who, the employer alleges, did settle the claimant's civil action against Waldron Duffy without first

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[2] This is established by the fact that subsection 33(c) of the Act explicitly states that the word "representative" will be used in section 33 to mean "legal representative." According to Black's Law Dictionary, a "legal representative" is a "person who oversees the legal affairs of another." The examples given include executors of estates and court-appointed guardians, but do not include attorneys at law. Hence, I conclude that as used in section 33 the term "representative" does not include attorneys at law unless they are acting as executors, court-appointed guardians or in some similar capacity.

obtaining the approval of the employer and insurer. Consequently, two issues have been raised: (1) can the claimant be bound for purposes of applying subsection 33(g) by the actions of her attorney, and (2) if so, did the claimant's attorney in fact execute a settlement without obtaining the advance approval of the employer and insurance carrier.

A. Attributing Actions of the Attorney to the Claimant

It is obvious that if a claimant could avoid the requirements of section 33 merely by authorizing an attorney enter into a settlement with a third-party tortfeasor, subsection 33(g) would fail to achieve its legislative purposes. Accordingly, I conclude that the actions of an attorney should be attributed to a claimant if necessary to achieve the purposes of section 33. When it is recognized that the primary purpose of subsection 33(g) is to preclude claimants from entering into settlement agreements with third-party tortfeasors that might adversely affect the interests of employers and their insurers, it is [sic] becomes clear that the appropriate standard under section 33 for determining when a claimant should be bound by the settlement-related actions of the claimant's attorney is the standard that would be applied by the court having jurisdiction over the civil action against the third-party tortfeasor.

In this case, the claimant's civil action is under the jurisdiction of the state courts of California and therefore California state law has to be applied to determine whether the settlement-related actions of Mr. Wartnick

are binding on the claimant. The leading California state court decision on the authority of an attorney to bind a client to a proposed settlement is the *en banc* decision of the California Supreme Court in *Blanton v. Womancare, Inc.*, 212 Cal. Rptr. 151, 38 Cal.3d 396, 696 P.2d 645 (1985). In that decision the court held that a client can be bound to a settlement entered into by the client's attorney in only three circumstances: (1) if the attorney was acting within the scope of his or her actual authority (express or implied), (2) if the attorney was acting with apparent or ostensible authority, or (3) if an unauthorized settlement was later ratified by the client. 696 P.2d at 649. After applying these criteria to the facts of this case, I conclude for the reasons set forth below that the claimant has not been bound under California law by Mr. Wartnick's efforts to settle her claim against Waldron Duffy.

1. Actual Authority

As explained in the *Blanton* decision, in California an attorney may bind a client to a settlement if the attorney has actual authority to enter into the settlement. Such authority may be either express or implied. However, the evidence in this case clearly shows that the claimant did not on any occasion give Mr. Wartnick either type of actual authority to settle her civil action. For example, the evidence is uncontradicted that the claimant never gave Mr. Wartnick express authority of any kind with regard to the possible settlement of her civil action. Indeed, the evidence indicates that the claimant's counsel in the Longshore Act claim specifically directed Mr. Wartnick not to settle any civil claims without the advance

approval of the Longshore insurer. Likewise, nothing in the record indicates that the claimant ever did or said anything that would suggest that she was implicitly granting Mr. Wartnick actual authority to settle her civil claim. Although the employer appears to contend that the claimant's mere retention of Mr. Wartnick as an attorney implicitly conferred on Mr. Wartnick the authority to settle the claimant's civil case, this contention is clearly in error. In *Blanton* the court held that under California law an attorney is not authorized "merely by virtue of his retention in litigation, to 'impair the client's substantive rights or the cause of action itself.' " *Id.* at 650. Thus, the court noted, " 'the law is well settled that an attorney must be specifically authorized to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation.' " *Id.*

2. Apparent Authority

Even though the claimant did not give Mr. Wartnick either express or implied actual authority to settle her civil case, she could still be bound under California law by Mr. Wartnick's settlement actions if Mr. Wartnick had the apparent authority to enter into such a settlement. According to the California Supreme Court's decision in *Blanton*, "apparent authority is created, and its scope defined, by the acts of the principal in placing the agent in such a position that he appears to have the authority which he claims or exercises." *Id.* at 651. The only act that the claimant has taken that may have arguably given Mr. Wartnick the apparent authority to settle her civil claim

was the act of retaining Mr. Wartnick to represent her in the civil action. The court in *Blanton*, however, held that such conduct alone is not sufficient to confer on an attorney apparent authority to settle a civil claim or even to commit a client to binding arbitration. *Id.* at 652-53. Thus, the court quoted with approval the statement that "when it comes to such a substantial matter as compromise of an action, 'a person dealing with an attorney, as dealing with any agent, must ascertain whether the agent has authority to do the purported act and assumes the risk if in fact the agent has no such authority.' " *Id.* at 652. In view of this statement of California law, I find that Mr. Wartnick did not in fact have apparent authority to bind the claimant to a settlement of her civil case.

3. Ratification

Even if Mr. Wartnick lacked both the actual and apparent authority to settle the claimant's civil case against Waldron Duffy, a settlement entered into on the claimant's behalf could still be binding on the claimant if, following such an unauthorized settlement, the claimant ratified the settlement agreement. For example, an unauthorized settlement agreement could have been ratified if the claimant had signed a settlement release or accepted settlement funds after learning of the unauthorized settlement. However, there is no evidence that any such ratification occurred in this case. Nor, apparently, has the claimant ever said anything that in any way suggests that she approves of the settlement negotiated by Mr. Wartnick.

Nonetheless, the employer contends that the claimant has ratified the settlement "by silence" and by failing to take action to fire Mr. Wartnick. For two reasons, however, this contention is without merit. First, it has not been established that the claimant has in fact been fully informed about the unauthorized acts of Mr. Wartnick.[3] Although the claimant's deposition and written declaration establish that the claimant has not authorized Mr. Wartnick to settle her civil case, neither of these documents expressly indicates that the claimant is in fact aware of the fact that Mr. Wartnick has dismissed the claimant's action against Waldron Duffy or the fact that he had received $4500 for such dismissal. Likewise, even though Mr. Wartnick testified that some unnamed person in his office informed the claimant of "an offer" to settle her claim against Waldron Duffy for $4500, such testimony hardly establishes that the claimant was fully informed about all that Mr. Wartnick had done.[4] Accordingly, I conclude that the evidence fails to show that the claimant has been fully informed of the unauthorized

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[3] It is well established that without such a showing there can be no ratification of an agent's unauthorized acts. *Horner v. Ferron*, 362 F.2d 224, 231 n.10 (9th Cir. 1966).

[4] Indeed, it is questionable whether anyone from Mr. Wartnick's office actually did contact the claimant about the $4500 "offer" from Waldron Duffy. There are two reasons for such doubt. First, Mr. Wartnick was unable to say who in his office made such a contact or exactly when such a contact occurred. Second, the only settlement offer the claimant could recall during her deposition was an offer for $20,000 – an amount which was apparently offered to the claimant by the Longshore Act insurer to settle her Longshore Act claim. Tr. at 116.

actions of Mr. Wartnick. Absent such a showing, the claimant cannot be found to have ratified his actions.

Second, even if the claimant had been fully informed of Mr. Wartnick's unauthorized actions, her actions have not implied any type of silent ratification. Rather, the testimony of Mr. Wartnick and Mr. Jones indicates that the claimant refused to sign a release in favor of Waldron Duffy. Hence, to the extent that there is evidence on this issue, it indicates that the claimant rejected rather than ratified any settlement agreement with Waldron Duffy. Moreover, the employer's suggestion that the claimant's failure to fire Mr. Wartnick constitutes ratification of his actions is unpersuasive. There is no support for such a proposition in the case law and a rule requiring a client to fire an attorney in order to avoid ratification of unauthorized acts would in effect require an extreme response in situations where less drastic measures would be sufficient.

For the foregoing reasons, therefore, I find that the claimant is not bound by Mr. Wartnick's unauthorized efforts to settle the claimant's case against Waldron Duffy.

B. Execution of a Settlement Agreement

Since I have determined that the claimant is not bound under California law for Mr. Wartnick's unauthorized efforts to settle her case against Waldron Duffy, the claimant's rights to benefits under the Longshore Act are not barred under subsection 33(g) of the Act. Hence, it is unnecessary to decide whether the actions of Mr. Wartnick in fact constituted the execution of a settlement agreement within the scope of subsection

33(g). However, it is noted that in all probability the actions of Mr. Wartnick did in fact constitute the execution of a settlement agreement. Most significantly, in this regard, Mr. Wartnick consented to the dismissal of the claimant's civil action with prejudice and received settlement monies in return. It appears from the legal citations provided by the employer that these actions were by themselves sufficient to constitute the execution of a settlement agreement under California law, if Mr. Wartnick had in fact had the authority to enter into settlement agreements on the claimant's behalf.

Finally, it is noted that the employer has contended that because the dismissal of the claimant's action against Waldron Duffy was granted with prejudice more than six months before Mr. Wartnick and Mr. Jones agreed to vacate the dismissal, the dismissal is final under California law and cannot be set aside, even with the consent of the parties. This may be a correct interpretation of California law and as a result it may not be possible for the employer to ever obtain any type of recovery from Waldron Duffy. However, this does not mean that the claimant's Longshore Act claim is barred by the provisions of subsection 33(g). Subsection 33(g) applies only when a person entitled to compensation or that person's representative, either directly or through the *authorized* actions of an attorney, enters into an unapproved settlement. Since the actions of Mr. Wartnick in this case were not authorized by the claimant, subsection 33(g) is inapplicable even though the unauthorized actions of the claimant's attorney may have in fact prejudiced the employer's ability to obtain any recovery from Waldron Duffy. In

short, such actions may have constituted actionable negligence on the part of Mr. Wartnick, but they do not provide grounds for relief under subsection 33(g).

ORDER

1. The employer's motion for rescission of the aforementioned stipulations is denied.

2. Counsel for the claimant shall within 30 days of this order submit a fully supported application for costs and fees and serve a copy of such application on opposing counsel. Opposing counsel shall have 20 days from the date of service of such application in which to reply.

/s/ Paul A. Mapes
Paul A. Mapes
Administrative Law Judge

Date: OCT 18 1993
San Francisco, California

APPENDIX D

33 U.S.C. § 933

LONGSHORE AND HARBORWORKERS' COMPENSATION ACT

Sec. 933. Compensation for injuries where third persons are liable

(a) Election of remedies

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of compensation operating as assignment

Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term "award" with respect to a compensation order

means a formal order issued by the deputy commissioner, an administrative law judge, or Board.

(c) Payment into section 944 fund operating as assignment

The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

(d) Institution of proceedings or compromise by assignee

Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Recoveries by assignee

Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to –

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) Institution of proceedings by person entitled to compensation

If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person.

Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

(g) Compromise obtained by person entitled to compensation

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

(3) Any payments by the special fund established under section 944 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment rendered against a third person referred to under subsection (a) of this section. Notwithstanding any other provision of law, such lien shall be enforceable against such proceeds, regardless of whether the Secretary on behalf of

the special fund has agreed to or has received actual notice of the settlement or judgment.

(4) Any payments by a trust fund described in section 917 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment recorded against a third person referred to under subsection (a) of this section. Such lien shall have priority over a lien under paragraph (3) of this subsection.

(h) Subrogation

Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

(i) Right to compensation as exclusive remedy

The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

APPENDIX E

Name, Address and Telephone No.) of Attorney(s) RODERICK D. JONES ESQ. ARCHER, MCCOMAS & LAGESON 2033 N. Main Street, Suite 800 Walnut Creek, CA 94596 (510) 930-6600 Attorney(s) for . . . Defendant(s) . .)	Space Below Illegible of Court Cost Only (Filed Sep. 11, 1992)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ALAMEDA
(SUPERIOR, MUNICIPAL, or JUSTICE)

(Name of Municipal or Justice Court District or of branch court, if any)

Plaintiff(s): BEATRICE STADTMILLER Defendant(s): RAYBESTOS-MANHATTAN, INC., et al. (Abbreviated Title)	CASE NUMBER 692289-2 REQUEST FOR DISMISSAL TYPE OF ACTION [X] Personal Injury, Property Damage and Wrongful Death: [ ] Motor Vehicle [X] Other [ ] Domestic Relations [ ] Eminent Domain [X] Other: (Specify) Asbestos Exposure

TO THE CLERK: Please dismiss this action as follows: (Check applicable boxes.)

1. [xx] With prejudice [ ] Without prejudice

2. [ ] Entire action [xx] Complaint only
   [ ] Petition only [ ] Cross-complaint only
   [xx] Other: (Specify)

   * As to defendant Waldron, Duffy, INc. only. Each party to bear it's own costs.

Dated: 9/8/92
* If dismissal requested is of specified parties only, of specified causes of action only or of specified cross-complaints only, so state and identify the parties, causes of action or cross-complaints to be dismissed.

/s/ Illegible
Attorney(s) for
Plaintiff(s)

CARTWRIGHT, SLOBODIN, BOKELMAN, et al.
(Type or print attorney(s) name(s))

TO THE CLERK: Consent to the above dismissal is hereby given.**

DISMISSAL ENTERED SEP 11 1992

* * *

Victoria Edises, Esq.
Anne Landwehr, Esq. (C.S.B. #158302)
KAZAN, McCLAIN, EDISES & SIMON
A Professional Law Corporation
171 Twelfth Street, Third Floor
Oakland, California 94706
Telephone: (510) 465-7728

Attorneys for Claimant
BEATRICE STADTMILLER

UNITED STATES DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

BEATRICE STADTMILLER (widow of DELBERT STADTMILLER), Claimant, vs. MALLOTT & PETERSON, employer and INDUSTRIAL INDEMNITY, carrier, Defendant.	OALJ Case No. 92-LHC-2755 OWCP Case No. 18-87454 DECLARATION OF HARRY WARTNICK

I, Harry Wartnick, declare, the following:

1. I represent BEATRICE STADTMILLER in a civil lawsuit against the manufacturers and suppliers of asbestos products.

2. I have never had authority from Mrs. Stadtmiller to settle any part of her civil case.

3. Civil settlement papers have never been sent to BEATRICE STADTMILLER from my office, and Mrs. Stadtmiller has never signed any civil settlement papers.

4. My office has not entered into any civil settlements with any civil defendant on behalf of BEATRICE STADTMILLER.

5. My office has never forwarded any monies representing settlement of the civil case to BEATRICE STADTMILLER, and I have no knowledge of any civil settlement monies received by BEATRICE STADTMILLER.

6. Last year I negotiated a group of sixty (60) cases with civil defendant WALDRON DUFFY. They made offers to these plaintiffs which were subject to approval by my clients. The offer that WALDRON DUFFY made to Mrs. Stadtmiller has never been forwarded to her and has not been accepted by her. Similarly, I have not accepted the proposed settlement with WALDRON DUFFY on behalf of BEATRICE STADTMILLER. I have not been authorized to accept such a settlement by Mrs. Stadtmiller. I have not even presented the proposed settlement to Mrs. Stadtmiller.

7. After negotiating these cases with WALDRON DUFFY, defendant WALDRON DUFFY or its insurance carrier chose to send me a check for the entire amount of the sixty (60) offers rather than sending sixty (60) separate checks after settlement papers were returned. That portion of the WALDRON DUFFY check representing the Stadtmiller offer remains in our Trust Account.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 19, 1993, at San Francisco, California.

/s/ Illegible

MESSRS. LAUGHLIN, FALBO, LEVY & MORESI

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

BEATRICE STADTMILLER, Claimant, vs. MALLOTT & PETERSON, Employer, and INDUSTRIAL INDEMNITY, Carrier.	OALJ Case No. 92-LHC-2755 OWCP Case No. 13-87454

DEPOSITION OF BEATRICE STADTMILLER
TUESDAY, MAY 25, 1993

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* * *

[p. 19] Mr. Wartnick did you ever discuss settlement or authorization of settlement of your claim with him?

A. No.

Q. Other than the conversation that you had on the phone that we have previously discussed, did you ever instruct anyone from the Cartwright office not to settle any portion of your claim, your civil claim?

A. I had no reason to talk about it.

Q. But do you ever recall instructing anyone from the Cartwright office not to settle a portion of your claim?

A. Neither way. Didn't do either.

Q. So you didn't instruct them to settle or not to settle?

A. Right.

MS. EDISES: Well, that is confusing. You said, "Other than the conversation –" You mean other than that one conversation where she rejected the offer? She hasn't given such-and-such instruction? Is that what you meant?

MR. POPPY: Right.

MS. EDISES: Okay.

MR. POPPY: Q. What is the current status of that civil claim?

A. I have no idea.

Q. Are you aware of any activity in that claim

* * *

M 221-6384

HANOVER INSURANCE

MASSACHUSETTS BAY INSURANCE CO
EXECUTIVE OFFICE: WORCESTER, MASSACHUSETTS 01605

CHECK NO. 00419105 51-44/119
00419105

TO ORDER OF
CARTWRIGHT, SLOBODIN, ET AL
IN TRUST FOR VARIOUS ASBESTOS PLAINTIFFS
P O BOX 8035
WALNUT CREEK CA 94596-3728

VOID AFTER 6 MONTHS

PAY $ **60,250.00

FOR FULL & FINAL SETTLEMENT OF
59 ASBESTOS BI CLAIMS

SURED / AIMANT	DATE OF LOSS	ADJ. OFF.	POLICY NUMBER	FEA.	DATE ISSUED
BASCO INC. / DAVID ACKERMAN	01/01/87	47	QDM 0907429	01	08/21/92

AIM NO. 470513100100

ISSUED AT SACRAMENTO, CA

SIGNATURE [signature] NOT NEGOTIABLE
BILL MAKIMOTO

NNECTICUT NATIONAL BANK

DETACH BEFORE DEPOSITING

TEM

MCDERMOTT-COSTA CO INC
276 DOLORES AVENUE
P.O. BOX 758
SAN LEANDRO, CA 94577

THE ADJUSTER HANDLING
THIS CLAIM IS
TAMARA K. BELEW

88

ARCHER, MCCOMAS & LAGESON
P O BOX 8035
WALNUT CREEK CA 94596-3728

ADJ. NO.	SIGNER	ISS. OFF
076	12	47

ATTACHED CHECK IS IN PAYMENT OF LOSS EXPENSE SHOWN ABOVE FIELD CLAIM OFFICE

000099

App. 64

BEST AVAILABLE COPY

16761030

TRIPLICATE

16761030

☐ THE OHIO CASUALTY INSURANCE CO. ☐ AMERICAN FIRE AND CASUALTY CO. AUGUST 14, 19 92

☒ WEST AMERICAN INSURANCE CO. ☐ OHIO SECURITY INSURANCE CO. ☐ THE OHIO LIFE INSURANCE CO.

$120,500.00

Pay ONE HUNDRED TWENTY THOUSAND FIVE HUNDRED AND 00/100 ---------- DOLLARS

to the order of Cartwright, Slobodin, et al in trust for various asbestos plaintiffs

Policy No. XLW 176941 Loss Date 8/31/83 19

Claim No. OAK 1 GL 87-62 92 12 W

For: SETTLEMENT OF ALL CLAIMS AGAINST WALDRON AND DUFFY, INC.

Tax I.D. No. M.P. ☐ 1 ☐ 2

Insured: Waldron and Duffy, Inc.

BODILY INJURY			2	3	5
PROPERTY DAMAGE				4	
MEDICAL PAYMENT			6-APPR.	8-ADJ.	9-LEGAL
COMPREHENSIVE					
COLLISION					
GENERAL FIRE			H.O. CODE	BRANCH MGR.-SUPV.	H.O.
[redacted] Col	120,500.00				
STATUS OF FILE	AMT. APPLIED	RES. CAR'D FWD.			

MESSAGE AREA

CARD ONLY

BRS

000104

LAW OFFICES
ARCHER, MCCOMAS & LAGESON
A PROFESSIONAL CORPORATION
2033 NORTH MAIN STREET, SUITE 800
PERI EXECUTIVE CENTRE
P.O. BOX 8035
WALNUT CREEK, CALIFORNIA 94596-3728

(510) 930-6600
FAX NO. (510) 256-6627

[Letterhead Omitted In Printing]

August 4, 1992

Mr. Ray Horton
Claims Manager
The Ohio Casualty Group
P. O. Box 5126
Concord, CA 94524

Ms. Tamara Belew
Claims Representative
Hanover Insurance Co.
P. O. Box 15380
Sacramento, CA 95851

Re: Insured : Waldron, Duffy, Inc.

Dear Mr. Horton and Ms. Belew:

We are pleased to inform you that we have settled 60 of the Waldron, Duffy Cartwright cases as per the enclosed settlement list. The total amount for the 60 cases is $180,750. The one-third split to Hanover and two-thirds split to Ohio works out to $60,250 for Hanover and $120,500 for Ohio. Please send us your check/draft which

we will exchange for the properly executed Releases and/or dismissals.

As you will recall, this particular group of Waldron, Duffy cases contained an abnormally large number of cases where the plaintiffs had serious disease including lung cancer or mesothelioma. As a result, we had requested up to $10,000 authority on those cases and you will note that only the Salsman case settled for the full authority. The average for the more serious cases was $8,066.66. The average for the remaining cases worked out to be $1,389.53.

We have recently received 23 new Cartwright cases against Waldron, Duffy and we will be reporting to you on those as soon as we have some information.

If you should have any questions, please don't hesitate to contact me.

Very truly yours,

ARCHER, McCOMAS & LAGESON

/s/ Rod Jones
Roderick D. Jones

RDJ/bd
Attachment